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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. [redacted] 37

PAUL DILLON,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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PAUL DILLON,
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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled cause on January 5, 1955.

OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed in the Appendix, infra, pp. 17-29.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 5, 1955 (Appendix, infra, p. 30). A timely petition for rehearing was filed by petitioner, and this petition was overruled on February 1, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. A., § 1254 (1).

QUESTIONS PRESENTED.

(1) Whether in a prosecution under a felony indictment for tax evasion under § 145 (b) of the 1939 Internal Revenue Code, the trial court is required by Rule 31 (c) of the Federal Rules of Criminal Procedure to give a requested misdemeanor instruction under § 3616 (a) of the 1939 Internal Revenue Code, and thus allow the jury to determine whether defendant committed the greater or lesser offense.

(2) Whether in a prosecution under a felony indictment for tax evasion under § 145 (b) of the 1939 Internal Revenue Code, the trial court is required by Rule 31 (c) of the Federal Rules of Criminal Procedure to give a requested misdemeanor instruction under § 145 (a) of the 1939 Internal Revenue Code, and thus allow the jury to determine whether defendant committed the greater or lesser offense.

(3) Whether in a prosecution of a lawyer for evading his own income tax based on specific items of income alleged to be unreported, the burden of proof or the burden of going forward with the evidence may be shifted to the taxpayer after merely having a witness identify seven checks payable to and endorsed by the taxpayer, two of which are marked "fees," two marked "legal services," and the rest not marked, when the maker of the checks is available in the courtroom, and in the absence of any evidence concerning the relationship between the maker and the taxpayer, and further in the absence of evidence as to when the markings were placed on the checks.

STATUTES AND RULE INVOLVED.

Rule 31 (c), Federal Rules of Criminal Procedure, provides:

Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

26 U. S. C., former § 145, provides:

(a) **Failure to file returns, submit information, or pay tax.** Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties, provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) **Failure to collect and pay over tax, or attempt to defeat or evade tax.** Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more

than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

26 U. S. C., former § 3616 (a), provides:

Whenever any person—

False returns. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made * * * he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the Court, with costs of prosecution.

STATEMENT.

Petitioner, a 77 year old Missouri lawyer, was convicted by a jury of attempting to defeat and evade the payment of his income tax for the years 1950 and 1951 under a two count felony indictment which charged violations of § 145 (b) of the 1939 Internal Revenue Code, 26 U. S. C. A., § 145 (b), and was sentenced to imprisonment for a period of 15 months and fined $2,500. The indictment accused him of understating taxes in the amounts of $157.00 for the year 1950 and $1,621.14 for the year 1951 (R. 1-2).

The gross receipts shown on petitioner's tax return for 1950 was the total amount listed in his books. The gross receipts shown on petitioner's tax return for 1951 was $999.08 more than the total amount listed in his books (R. 60). The government prosecuted its case on the theory that petitioner's books did not reflect all of his legal fees from two individuals named Broadhead and Packs in 1950 and from Packs alone in 1951 and, consequently, that his income tax returns understated his true income.

All the evidence was presented in about two hours at the trial and consisted principally of the testimony of

Broadhead, an internal revenue agent, and an employee of Packs.

The employee of Thomas Packs (Thomas Packs Amusement Enterprises) identified seven checks of that concern payable to petitioner during the years 1950 and 1951, signed by Packs and endorsed by petitioner (R. 31, 33-39). The employee had no business dealings with petitioner and did not state the reason for the issuance of the checks. He only said that he was identifying certain company records and that he could not testify of his own knowledge that money was paid to petitioner (R. 31-32). Thomas Packs did not testify although he spoke to the revenue agent handling the case in the hall near the court room during the trial (R. 59). Two of the checks (Exhibits Nos. 8, 9) were marked "fees," two of the checks (Exhibits 4, 7) were marked "legal services" and the rest had no markings of purpose (Exhibits 5, 6, 10). There was no testimony as to when these checks were so marked. These seven checks total $10,026.84. Petitioner's book reflected income from Packs in the amount of $3,284.67. The government's theory was that Exhibits 4 and 10 were not entered in petitioner's records, Exhibits 5, 6, 8 and 9 were understated and that Exhibit 7 was correctly entered (R. 52-53). No other evidence was offered concerning either the relationship of petitioner and Packs or the purpose of these checks.

Petitioner represented Broadhead as an attorney in a matter pending in Mississippi from 1949 to 1951 (R. 50). Broadhead paid him $2,000.00 in cash in March, 1950 and $1,250.00 by check in June, 1950 (R. 40). Broadhead testified that petitioner brought in a Mississippi attorney as associate counsel. Broadhead did not pay this associate counsel for representing him (R. 42). However, he knew that the Mississippi attorney was going to be paid, and that it was petitioner's responsibility to pay him. But he did

not know anything about the arrangements between petitioner and associate counsel. Associate counsel, moreover, attended every meeting that Broadhead had with petitioner and appeared in court for him (R. 41-42). Petitioner's books showed $1,000.00 received from Broadhead in March, 1950 and $1,250.00 received from him in June, 1950 (R. 47).

The only evidence of the remainder of petitioner's income, considered to be correctly reported, was petitioner's records (Exhibits Nos. 14, 15 and 16, R. 47-51).

The trial court refused to give either of petitioner's requested instructions that the jury might find him guilty of a lesser offense—specifically, a misdemeanor either under § 3616 (a) or § 145 (a) of the Internal Revenue Code (R. 92-93). Petitioner excepted to the refusal of the Court to give these instructions on the ground that under Rule 31 (c) of the Federal Rules of Criminal Procedure he was entitled to such instructions (R. 94).

The court below (Appendix) affirmed the conviction holding that defendant was not entitled to an instruction as to a lesser offense under Rule 31 (c) of the Federal Rules of Criminal Procedure because § 3616 (a) was inapplicable to income tax violations, and § 145 (a) was inapplicable because it was not an offense presented by the evidence. The court concluded "both from the language of § 3616 and the statutory context where it was formally placed, that it was never intended to apply to income tax returns." The court, in reaching this result, found that § 7207 of the 1954 Internal Revenue Code which replaced § 3616 was broad enough to apply to income tax derelictions and that the "element of willfulness, absent in § 3616 but previously consistently present in offenses relating to income tax violations, was inserted." The court held, in regard to § 145 (a), that there was no evidence offered

"that defendant failed to file a return or to show the willful failure to pay the tax when due, except insofar as willfulness was involved in the charged willful and felonious attempt to evade the payment of taxes owed" and therefore it was not error to instruct on an offense not presented by the evidence.

The court held, in regard to the seven Packs checks, that the foundation offered by the Government fully indicated that the receipts were income and that the transfer of the burden of proof or the burden of going forward with the evidence to the defendant was proper because there was a manifest disparity in convenience of proof and opportunity of knowledge between the defendant and the Government. The court found that the checks payable to defendant were under circumstances indicative that they were for legal services, that this evidence was fairly indicative of income received by defendant and, therefore, all these checks were admissible in evidence. As far as the sufficiency of evidence was concerned, the court stated that the evidence justified a finding that the checks received by defendant represented income and that this evidence, "coupled with evidence that defendant attempted to conceal a portion of it by not entering it on his books and not reporting a substantial amount in his returns, was sufficient to show the willful filing of a false return."

REASONS FOR GRANTING THE WRIT.

1. This case raises important questions concerning Rule 31 (c) of the Federal Rules of Criminal Procedure and its application to income tax derelictions. Whether a defendant charged with a felony under the income tax laws may be convicted of a misdemeanor is a question the settlement of which is plainly in the public interest since it is likely to be presented in current and subsequent income tax

evasion proceedings which number approximately one thousand per year. Moreover, although § 145 (b) has been the principal statute used for prosecuting income tax evasions, the policy of the government of using § 3616 (a) in its stead when the amounts understated have been relatively small has been blocked by the holding below that § 3616 (a) is inapplicable to income tax prosecutions. Furthermore, this decision has an effect on other types of criminal prosecutions since the use of Rule 31 (c) has heretofore been limited mainly to murder or robbery prosecutions.[1]

(a) Section 3616 makes the filing of a false or fraudulent return with intent to defeat or evade the assessment of taxes a misdemeanor. The Court below committed a basic error in refusing to hold that section applicable to income tax derelictions. It reaches this result despite the fact it finds that § 7207 of the 1954 Internal Revenue Code which replaced § 3616 applies to income tax violations. Overlooked are both the Senate and House Committee Reports relative to § 7207 which clearly indicate that the 1954 Code did not change the 1939 Code in this respect. The Senate Report states: "This section, which is identical with the House bill contains no material change in existing law." S. Rep. No. 1622, 83d Cong., 2d Sess. (1954) 603, 1954 U. S. Code Congressional Service 3251. The House Report is identical. H. R. Rep. No. 1337, 83d Cong., 2d Sess. (1954), A 425, 1954 U. S. Code Congressional Service 1111.

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[1] Under a charge of murder, defendant may be convicted of manslaughter. *Stevenson v. United States*, 162 U. S. 313, 315; *Wallace v. United States*, 162 U. S. 466, 476; *Barbeau v. United States*, 193 F. 2d 945. Under an indictment charging robbery, defendant may be convicted of larceny. *Lamore v. United States*, D. C. Cir., 136 F. 2d 766. A suggestion as to its application under the Gamblers' Occupational Tax Act, 26 U. S. C. A., former §§ 3294 (c), 2707 (b), is found in *United States v. Kahringer*, 3 Cir., 210 F. 2d 565, 571-572.

The Court concluded that § 3616 was inapplicable because it did not require a wilful act and that under **Spies v. United States**, 317 U. S. 492, Congress has applied criminal sanctions only to wilful violations of the revenue laws. Ignored is **Morissette v. United States**, 342 U. S. 246, which holds that the mere omission of wilful in a criminal statute does not eliminate intent as an element of the offense. Furthermore, the phrase "with intent to defeat or evade the * * * assessment" in § 3616 indicates wilfulness.

Not only is § 3616 incorporated into § 7207 of the 1954 Code, but § 894 (b) (2) (A) of the 1939 Internal Revenue Code which provided criminal penalties for estate tax derelictions is also incorporated in that new section. Section 894 (b) (2) (A) provided a misdemeanor penalty for the following act:

> "Whoever knowingly makes any false statement in any notice or return required to be filed under this subchapter . . ."

Section 894 (b) (2) (B) is practically equivalent to the wording of § 145 (a), and § 894 (b) (2) (C) is equivalent to § 145 (b). The incorporation of both § 3616 (a) and § 894 (b) (2) (A) into the new section 7207 coupled with the lack of an equivalent in § 145 of § 894 (b) (2) (A) leads to the conclusion that § 3616 (a) was equivalent to § 894 (b) (2) (A). Under this construction "knowingly" in § 894 (b) (2) (A) is equivalent to "with intent to defeat or evade the * * * assessment" in § 3616 (a).

The court below has also overlooked the history of § 3616 as that statute was originally enacted in 1864[2] in an act which imposed an income tax[3] and provided for income tax returns.[4]

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[2] Act of June 30, 1864, c. 173, § 15, 13 Stat. 226.

[3] 13 Stat. 281.

[4] 13 Stat. 225.

The position of § 3616 in the 1939 Code next to §§ 3614 and 3615 which allow the Commissioner of Internal Revenue and the Collector to issue summons for the inspection of records for the determination of tax liability including income tax liability shows that the former statute applies to income tax offenses.

Moreover, the relationship of the fraud penalty imposed by § 3612 (b) (2) with that of § 293 of the Code is of significance. Section 293 specifically provides a fraud penalty for income tax derelictions and states that the penalty so provided shall be "in lieu of the fifty percentum addition for the tax provided in § 3612 (b) (2)." Note that § 145 nowhere states that its penalty shall be in lieu of penalties imposed by § 3616. The fact that Congress in enacting § 293 specifically mentions 3612 is an indication that § 3616 is applicable to income tax derelictions because of their juxtaposition in the same chapter of the Code.

The difference between 145 (b) and 3616 (a) may be that the latter does not require any affirmative act of concealment. The reason for the sparsity of appellate decisions under 3616 (a) may be due to the fact that the same evidence can bring a conviction under 145 (b) if an affirmative act of concealment occurred. **Slick v. United States**, 7 Cir., 1 F. (2d) 897, affirmed a conviction under an income tax indictment which follows the language of § 3616 (a), and therefore apparently applied that section to an income tax violation.

The holding that § 3616 is inapplicable to income tax offenses is, moreover, in apparent conflict with **Taylor v. United States**, 9 Cir., 179 F. 2d 640, a habeas corpus proceeding, which holds that § 3616 did not repeal § 145 (b) by implication. The apparent conflict is recognized by the court below in the instant case when it states:

> "The fact, as pointed out in the Taylor case, . . . that § 3616 was enacted long prior to § 145 and does

provide a penalty for submitting a false return (or list) without willfulness, and none of the later prohibitions of § 145 do so, would be some indication that the existence and application of the older § 3616 to all tax matters, including tax returns, was recognized by Congress when § 145 was enacted, and that the reason for not making provision in § 145 for a penalty for nonwillful filing of a false return was to avoid duplicating § 3616 (a), **if Congress had not indicated such was not the intention when it revised the entire tax code by the Internal Revenue Code of 1954."**

(b) Section 145 (a) makes it an offense (1) to fail to pay a tax,[5] (2) to fail to make a return or declaration for the purpose of the computation, assessment or collection of the tax,[6] (3) to fail to keep any records for such tax purposes, (4) or to fail to supply information for such purposes.[7]

Every violation of Section 145 (b) necessarily includes violations of Section 145 (a) and an offense under the latter section is therefore necessarily included in an offense under the former section. **Spies v. U. S.**, 317 U. S. 492, seems to hold that the felony under Section 145 (b) includes a misdemeanor under Section 145 (a), and that the latter offense is embraced within the former. The issue in the **Spies** case was whether a wilful failure to file a return, together with a wilful failure to pay a tax, may without more constitute an attempt to cheat or evade a tax within the meaning of § 145 (b). This court held that it took more than the sum of two such misdemeanors to make a felony violation under § 145 (b). This court concluded that a felony may include lesser offenses in combination either

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[5] *Spies v. United States*, 317 U. S. 492, 496.

[6] *United States v. Sullivan*, 274 U. S. 259, 262.

[7] *United States v. Murdock*, 290 U. S. 389, 391.

with each other or with other elements, and that the felony proscribed by § 145 (b) include one or several of the other offenses against the revenue laws, and that Congress in using the terminology "attempts . . . to evade or defeat" to cover the gravest of offenses against the revenue law intended "some wilful commission in addition to the wilful omissions that make up the list of misdemeanors."

Every violation of § 145 (b) includes one or more of the omissions proscribed in § 145 (a). One element always required to be present is that a tax be due. A failure to supply information is always present in cases where the evidence shows that a defendant kept a double set of books, made false entries of false invoices, destroyed books or records, concealed assets, concealed the source of his income, or handled his affairs to avoid making the usual records. A misdemeanor and a felony both require a failure to make a disclosure as to the amount of income of the taxpayer. A failure to file returns may constitute a violation of either 145 (a) or 145 (b).[8] To constitute the greater offense, as this Court declared in the **Spies** case, some wilful commission is required (317 U. S. at 499):

> "We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues congress intended some wilful commission in addition to the wilful omissions that make up the list of misdemeanors. Wilful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a wilful and a possible attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony."

The evidence in this case required such an instruction. The Government's theory was that defendant's records

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8 *United States v. Smith*, 3 Cir., 206 F. 2d 905.

did not reflect all of his income. The evidence, therefore, must support the inference that he failed to keep the records required by § 145 (a) which makes it an offense to fail to keep proper records. The Government also contended that defendant did not pay all the tax that he should. Section 145 (a) makes it a misdemeanor to fail to pay a tax when it is due and the payment after the tax was due does not relieve a person from liability under this section. Cf. **Spies v. United States**, supra. One could also infer from the Government's case that the defendant failed to supply information and failed to make a complete return of all his income. If Section 145 (a) in proscribing an offense for failure to make a return also includes the failure to make a complete return, then this too would be embraced by the evidence.[9]

Defendant requested the Court to allow the jury to choose between these misdemeanors and the felony. Where there is evidence to show either a felony or one or more misdemeanors the prosecuting officials should not have the sole choice of deciding the offense of which the accused may be found guilty. If there are several offenses possible under the evidence and if there is a lesser offense embraced within a greater offense, defendant should be entitled, when he so requests, to the verdict of the jury on this issue in accordance with Rule 31 of the Federal Rules of Criminal Procedure.

2. The court below in holding that the evidence was sufficient and that a sufficient foundation was laid for the

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[9] In *Himmelfarb v. United States*, 9 Cir., 175 F. 2d 924, 944, the question of instructing on a lesser offense in a prosecution under § 145 (b) was raised. Appellant there claimed that the court erred in failing to instruct the jury on its own motion that it might find him guilty of a lesser offense embraced within the charge in the indictment; namely, a misdemeanor under § 145 (a). The court held that such an instruction was not justified under such circumstances.

admission of the seven Packs checks has gone beyond the permissible limits set forth in **Holland v. United States,** No. 37, this Term, decided Dec. 6, 1954. The court below has held that even in a specific item case where the Government knows the alleged source of income and where the alleged payer of the income is present in the court room, the Government does not have to call him as a witness.

These seven checks were identified by the secretary of the Thomas Packs Amusement Company, who did not know the reason for their issuance (R. 31-32). Thomas Packs was in the court room and had talked to the revenue agent, but was not called to testify (R. 59). Packs had full knowledge of why the checks were issued. The Government evidently found that Packs would testify to facts indicating that the money received from those checks was not income to defendant and therefore did not use him as a witness. Failure to call a material witness, without good cause showing, justifies the inference that the testimony of the witness would have been unfavorable.[10]

Morrison v. California, 291 U. S. 82, 88, and **United States v. Fleischman,** 339 U. S. 349, 360, were misapplied, as there was no disparity in convenience between the Government and the defense, especially in the absence of any showing by the Government as to the reason why Packs was not called as a witness. Indeed, the failure to call Packs as a witness compels the inference that he would testify that the checks were not income. As for the two checks marked "fees" and the two checks marked "legal services," these markings are hearsay and incompetent, as no foundation was laid for the admissibility of these statements on the checks under the Business Records Statute, 28 U. S. C., § 1732. These exhibits can not lift themselves by their own bootstraps, as a foundation must be established for their introduction by other evidence.

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[10] Schumacher v. United States, 8 Cir., 216 F. 2d 780, 787.

A component of the court's conclusion is that the Government's investigation did not substantiate defendant's statement that the checks were not income. The Government's investigation must check the validity of such a statement. Cf. **Holland v. United States,** supra. Such an investigation should have included an interview with Thomas Packs. Unless Thomas Packs said that the checks were income the revenue agent could not conclude that defendant's statement could not be substantiated. If Thomas Packs told the agent that the checks were income, he should have been called as a witness by the Government. And if, while testifying, he denied that the checks were income, he could be cross-examined as a hostile witness.[11] Failure to call Packs as a witness leads either to the conclusion that Packs never told the revenue agent that the checks were income and, if so, the Government's investigation was insufficient and did not warrant the conclusion that the checks were income, or the conclusion that there was no "disparity in convenience of proof or opportunity of knowledge," as Packs could have been called as a witness. Moreover, there was no evidence showing the "circumstances" under which these checks were given to defendant.

Furthermore, the only evidence that defendant declined to give information relative to the checks was at the pretrial hearing outside the presence of the jury on a motion to suppress evidence (R. 9-10, 11). It would seem that such a foundation, even if sufficient, should have been presented to the jury as well as to the court. And the Government was not without a remedy if the defendant declined to give information as he could have been prosecuted for failing to furnish information. See **United States v. Murdock,** 290 U. S. 389.

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[11] *Finnegan v. United States,* 8 Cir., 204 F. 2d 105, 111; *Banks v. United States,* 8 Cir., 204 F. 2d 666, 671.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Opinion.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 15,048.

Paul Dillon, Appellant,
vs.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[January 5, 1955.]

Morris A. Shenker and Sidney M. Glazer for Appellant.

Charles H. Rehm, Assistant United States Attorney (Harry Richards, United States Attorney, and Robert C. Tucker, Assistant United States Attorney, were with him on the brief), for Appellee.

Before Gardner, Chief Judge, and Collet and Van Oosterhout, Circuit Judges.

Collet, Circuit Judge.

The defendant was convicted by a jury of attempting to defeat and evade the payment of income taxes for the years 1950 and 1951. The Government presented evidence showing that defendant's receipts for 1950 were

substantially in excess of the amount reported for that year, and that his receipts for 1951 were approximately $5,700.00 more than reported. The defendant did not testify. Counsel sought to convince the jury that the Government's evidence was consistent with the hypothesis that all of the money shown to have been received by defendant was not income to him. He was an attorney. The argument was made that probably the portion of the receipts which was not reported as income went to associate counsel as fees, or did not belong to defendant, or that at least the Government had not shown the contrary. The court, in its charge to the jury, referring to that argument, instructed the jury that the questions of counsel which may have assumed that possibility were not evidence and that as the court understood the testimony, there was no evidence that the defendant had shared any fees with anyone. That part of the charge is assigned as error here.

As to this first assignment, it is argued that the court's charge was "one-sided" and constituted "advocacy against the defendant." The charge included the usual cautionary admonition that anything contained in it which might be construed by the jury as a comment on the evidence which differed from the jury's understanding of the evidence should be disregarded—that it was the jury's sole province to find the facts. The charge was not argumentative and did not go beyond pointing out the factual situation portrayed by the evidence. The situation here was very different from that in the cases of **Boatright v. United States**, 105 F. 2d 737, and **Billeci v. United States**, 184 F. 2d 394, cited by defendant.

Error is assigned on account of the admission as evidence of seven checks payable and delivered to defendant during the years covered by the indictment. Defendant contends that there was no foundation laid for the introduction of those checks in evidence, because there was no

testimony to the effect that the checks represented taxable income to the defendant. Two of them were marked "legal services", two were marked "fees", and three were not marked. The gravamen of defendant's contention is that before evidence of this nature should be admitted it should be first shown that the money was received under such circumstances as to "strongly" indicate it was actually taxable income, and that the burden of proof or the burden of going forward with the evidence to show that it was not income should not be shifted to the defendant, absent such initial showing. If the word "fairly" be substituted for "strongly", the principle is correct. If the foundation or initial evidence does fairly indicate that the receipts were income, the Government is not required initially to adduce positive evidence to support a negative hypothesis that it was not money received for someone else or that it was not received for some purpose which would prevent it from being income to the person to whom it was paid. The rule is not a new one. The explanation of the reason supporting it and the limitations of its application were stated by Mr. Justice Cardozo in **Morrison v. California**, 291 U. S. 82, 88, and reiterated by Chief Justice Vinson in **United States v. Fleischman**, 339 U. S. 349, 360. For a transfer of the burden—"experience must teach that the evidence held to be inculpatory has at least a sinister significance." 291 U. S. 82, 90. It may be said with considerable force and logic, as defendant now says, "that in view of the nature of the legal profession the mere receipt of money does not represent income," and that the "sinister significance" that it was income does not arise in an income tax prosecution from its receipt alone. But there is another exception so closely related that for practical purposes, at least under circumstances such as these, it is a part and parcel of the exception stated. The latter is—"if this [the sinister significance] be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity of knowledge. * * *

The decisive considerations are too variable, too much distinctions of degree, too dependent in last analysis upon a common sense estimate of fairness or of facilities of proof, to be crowded into a formula. One can do no more than adumbrate them; sharper definition must await the specific case as it arises." 291 U. S. 82, 91.

In the present case the Internal Revenue agent assigned to investigate this case prior to the indictment appears to have made inquiry of defendant seeking to determine if all of the amount of the checks in question did represent income or whether part was received for some other purpose, and that defendant declined to give any information other than that all of it was not income, which latter the agent was unable to substantiate. Under these circumstances the exception to the general rule that the burden of making an explanation will not ordinarily be shifted to the defendant in a criminal case applies, and the problem of the trial court became one of evaluating the circumstances and determining whether in fairness to both parties the evidence should be admitted upon the initial showing and leave to the defendant the opportunity to dispell the inference which could reasonably follow, absent explanation.

Great care should be observed in the exercise of judicial discretion to the end that no shifting of the burden placed upon the prosecution to prove guilt result in requiring to any degree or extent that a defendant prove his innocence. The burden of proof must remain on the prosecution to establish guilt. The administration of justice is not a game of chess or of hide-and-seek. It is a search for truth and the application of the law to the true facts in order that substantial justice be done under the law. The prosecution must not be permitted to introduce evidence which is not so indicative of guilt as to fairly point to guilt and cast the burden on the defendant to disprove an unfair implication or inference. One charged with a crime

may testify in his own behalf or not, as he chooses. In making the choice he must weigh the considerations in favor of a decision not to testify against the possibility or probability that evidence fairly adduced against him will be accepted at its face value with damaging results. If he decides not to explain, when absent an explanation he will appear to be guilty, he shall not be criticized for his choice. But if the evidence is of such a nature that it fairly indicates guilt, a defendant may not be heard to complain that an explanation reposing, comparatively speaking, particularly and peculiarly in him, has not been given by another. We have condemned the use of evidence which in fairness should not under the circumstances have been admitted and the burden cast upon the defendant to explain or suffer the possible consequences. But that is not the situation here. The checks were made payable to the defendant. They were either marked "fees" or "legal services" or were given to him under circumstances indicative that they were for legal services. They were all endorsed by defendant and cashed. The discretion involved in determining that this evidence was fairly indicative of income received by defendant, and permitting its introduction in evidence, was not abused in this instance.

A case involving a factual situation requiring a converse ruling will illustrate the limitation of the exception. In **Kirsch v. United States,** 174 F. 2d 595, the defendant was charged with having received income in an amount equal to his bank deposits. The Government's witness was permitted to assume that all of the bank deposits represented income, when the Government's investigation had disclosed that a large part of those deposits represented pay checks cashed for customers out of funds theretofore drawn from the bank for that purpose. Under those circumstances it was held unfair to admit the evidence of total deposits, characterized as income, and permit the inference from the proof of the amount of the deposits that all of those de-

posits constituted income, thereby casting the burden on defendant to disprove that inference.

It is asserted that the court committed reversible error in permitting the revenue agent to testify that Exhibits 4 and 10, two of the checks heretofore referred to, were not recorded in defendant's records and that Exhibits 5, 6, 8, and 9, four of those checks, were understated in those records. The complaint that is made is that the witness was testifying as an expert, that expert testimony is only admissible when the facts are so complicated that expert testimony is needed to assist the jury, that the defendant's records and the facts to be gleaned therefrom were not complicated and the jury did not need expert guidance. The argument is ingenious but lacks substance and merit. The records were in evidence before the jury. They were not voluminous. The cash receipt book, which the witness was familiar with, was handed to him and he was asked whether Exhibits 4 and 10 were recorded therein. Over defendant's objection that the question called for "a conclusion and opinion and comparison of documents," and that it had not been shown that the checks represented income, the witness answered that Exhibits 4 and 10 were not recorded. When asked about Exhibits 5, 6, 8, and 9, he testified that Exhibits 5 and 6, which were in evidence, totaled $4,500.00 and were recorded in the record as $1,500.00; that Exhibits 8 and 9, also in evidence, totaled $3,500.00 and were entered in the books as $1,500.00. These records were not very legible or orderly. The witness had made a calculation of the total receipts of the defendant. If the records were so abstruse as not to be readily understandable by the jury, an explanation was appropriate. But if it be assumed that the records were not of such a nature as to justify expert testimony to decipher or simplify them, then the checks and the records clearly showed for themselves what they alluded to and there was no possible prejudice in the witness so stating.

And if, as defendant contends, the latter be the situation, the witness' testimony was admissible for the purpose of explaining how his total figure of defendant's income was arrived at from these books. There was no prejudicial error in permitting this testimony.

Defendant was charged with a felony under § 145 (b), 26 U. S. C. A. § 145 (b). He requested an instruction that the jury might find him guilty of a lesser offense—specifically, a misdemeanor under § 145 (a), 26 U. S. C. A. § 145 (a), or § 3616 (a), 26 U. S. C. A. § 3616 (a). The request was denied. He contends that the lesser offenses defined in § 145 (a) and § 3616 (a) are included in the greater defined by § 145 (b) and that under Rule 31 (c) of the Federal Rules of Criminal Procedure,[1] he was entitled to the instruction. The pertinent portions of § 145 (a), § 145 (b), and § 3616 (a) are quoted in the footnote.[2]

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[1] "The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

Fed. Rules Cr. Proc., rule 31 (c), 18 U. S. C. A.

[2] § 145 (a). "Failure to file returns, submit information, or pay tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, * * * be guilty of a dismemeanor * * *."

(b) "Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, * * * be guilty of a felony * * *."

26 U. S. C. A. § 145 (a) and (b).

§ 3616. Penalties.

"Whenever any person—

(a) False returns. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with in-

As stated in **Spies v. United States**, 317 U. S. 492, 493, "Section 145 (a) makes, among other things, willful failure to pay a tax **or** make a return * * * a misdemeanor. Section 145 (b) makes a willful attempt in any manner to evade or defeat any tax * * * a felony." The indictment did not charge, nor did the evidence show, that defendant merely failed to pay a tax or failed to make a return. On the contrary, the evidence showed that a return was filed and a tax was paid. No evidence was offered that defendant failed to file a return or to show the willful failure to pay the tax when due, except insofar as willfulness was involved in the charged willful and felonious attempt to evade the payment of taxes owed. Hence the universal rule that it is not error to fail to instruct on an offense not presented by the evidence applies. There consequently was no error in failing to instruct that defendant might have been convicted of either of the misdemeanors defined by § 145 (a), of willful failure to pay a tax when due or willful failure to file a return.

As the quoted portion of § 3616 (a) shows, that section makes a misdemeanor the filing of a false or fraudulent list or return with intent to defeat or evade the assessment of taxes. Was this misdemeanor included in the felony defined by § 145 (b)? Defendant cites **Kirsch v. United States**, 174 F. 2d 595, as authority that it was.

The question of whether evidence which the defendant **claimed** only showed a violation of § 145 (a), coupled with evidence of a violation of § 3616 (a) of filing a false or fraudulent list or return, would sustain a conviction of feloniously attempting to evade or defeat the payment of a tax under § 145 (b), was presented in **Kirsch v. United**

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tent to defeat or evade the valuation, enumeration, or assessment intended to be made * * * he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

26 U. S. C. A. § 3616 (a).

States. Upon the record in that case the question was found to be abstract because, as was stated in the opinion, "**If** there was need for proof of affirmative acts other than those defined as misdemeanors in Sections 3616 (a) and 145 (a) in furtherance of an attempt to evade taxes, it is contained in the record." The present question not being presented by the record in the **Kirsch** case, it was not decided. Now we are confronted with the problem of determining whether § 3616 (a) really applies to income tax returns. If it does not apply to income tax violations, the offense it defines was not included in the felony charge based on § 145 (b) and Rule 31 (c) did not authorize a conviction under the felony charge of the lesser offense defined by § 3616 (a). And, if that be true, an instruction authorizing a conviction for the misdemeanor, not embraced in the felony charge, was not appropriate. The question has not been passed upon directly. We take note of cases cited by defendant.

In **Cave v. United States,** 159 F. 2d 464, this court sustained a conviction under § 145 (b) upon proof that the defendant willfully filed a false and fraudulent return. No exceptions were taken to the instructions at the time of trial. On appeal, complaint was made of the instructions on the ground that they were so indefinite, inconsistent and prejudicial as to require reversal, although no exceptions were taken. The precise point now presented, that the defendant was entitled to an instruction on the misdemeanor defined in § 3616 (a) in the event the jury found a false return had been filed but failed to find that it was willfully false, was not raised. In **Myres v. United States,** 174 F. 2d 329, the situation was the same.

In **Taylor v. United States,** 179 F. 2d 640, on an appeal from a denial of habeas corpus, one convicted under § 145 (b) contended that § 145 (b) had been repealed by implication by § 3616 (a). In that case note was not taken

of the fact that § 145 (b) involves willfulness while § 3616 does not. The court rested its denial of the contention on the fact that § 3616 (a) was originally enacted long prior to the enactment of § 145 (b) and could not have repealed by implication § 145 (b). Our attention has not been directed to any other reported cases in which there was any contention that § 3616 (a) applied to income tax violations.

The language of § 3616 (a), which appears under the heading "Penalties," differs from that customarily applied to income tax returns. Its juxtaposition to statutes relating to the duty of collectors to canvass their districts for taxable persons and objects, 26 U. S. C. A., § 3600; the entry of premises for examination of taxable objects during the day or night (§ 3601); search warrants (§ 3602); the making of a "list or return" by taxpayer of articles, objects, goods, wares and merchandise made or sold, charged with a tax, the rates of the tax and aggregate amount thereof, and if such list is not made by the taxpayer, the list should be made by the collector (§ 3611); the provision for penalties for failure to file "returns or lists" (§ 3612) without reference to similar penalties found in connection with that part of the code relating specifically to income taxes; rewards to informers with respect to illegally produced petroleum (§ 3617); all would appear to indicate a relationship of § 3616 to subjects other than income taxes. The fact, as pointed out in the **Taylor** case, 179 F. 2d 640, that § 3616 was enacted long prior to § 145 and does provide a penalty for submitting a false return (or list) without willfulness, and none of the later prohibitions of § 145 do so, would be some indication that the existence and application of the older § 3616 to all tax matters, including income tax returns, was recognized by Congress when § 145 was enacted, and that the reason for not making provision in § 145 for a penalty for nonwillful filing of a false return was to avoid duplicating § 3616 (a),

if Congress had not indicated such was not the intention when it revised the entire tax code by the Internal Revenue Code of 1954.

When the Internal Revenue Code was revised in 1954,[3] § 3616 (including § 3616 (a)) was dropped from the code. The only reference to it in the revision is found in Table 1 where § 3616 is shown to be incorporated in new § 7207 of Chapter 75 of the 1954 Revised Code. § 7207 is entirely different from § 3616. It reads:

"§ 7207. Fraudulent Returns, Statements, or Other Documents. Any person who wilfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both." Internal Revenue Code of 1954, 68A Stat. 853.

§ 7207 appears in the statutory context with other offenses relating to income tax offenses. It is sufficiently broad to apply to both income tax derelictions as well as to those subjects other than income taxes with which § 3616 was in juxtaposition. The only substantive portion of § 3616 which was retained and carried forward in the 1954 revision was placed with income tax derelictions. And then the element of willfulness, absent in § 3616 but previously consistently present in offenses relating to income tax violations, was inserted.

We are convinced, both from the language of § 3616 and the statutory context where it was formerly placed, that it was never intended to apply to income tax violations. If it had been intended to apply to income tax returns, the nonwillful making of an incorrect statement in the making of an income tax return, in the honest belief of its legal

[3] The date of its approval was August 16, 1954. By § 7851 (a) (6) (C), Chapter 75, relating to crimes, became effective as to offenses committed after the date of enactment of the 1954 Code.

justification but which would operate to defeat the assessment of income taxes, would have constituted a crime. In **Spies v. United States**, 317 U. S. 492, 497-498, the Supreme Court said that without the clearest manifestation of Congressional intent it would not be assumed that the mere knowing and intentional default in the payment of income tax, where there had been no willful failure to disclose the liability, was intended by Congress to constitute a criminal offense of any degree. The Supreme Court said that the willfulness required to constitute the offense of willful failure to pay income taxes when due, defined by § 145 (a), would be expected to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer. See also **United States v. Kahringer**, 210 F. 2d 565. The same reasoning applies here. We conclude that Congress did not intend by § 3616 (a) that a nonwillful inaccurate and ipso facto false statement in an income tax return, frequently very complicated, should constitute a crime. It only made such a false statement a misdemeanor when, by § 7207, it required that the statement be willfully made and known to be fraudulent or false as to a material matter. § 3616 (a) not being applicable, there was no error in failing to instruct concerning it.

There was no error in refusing to declare a mistrial because of newspaper publicity. Such matters are within the sound discretion of the trial court and, absent an abuse of discretion, such decisions are not reviewable. The court interrogated the jury after defendant's counsel called attention to the newspaper articles. Only one juror had read either article. He positively said it "did not make sense to him" and would not influence him in the least. There was no abuse of discretion.

The sixth assignment of error is that the court erred in overruling defendant's motion for a directed verdict at the

close of all the evidence. The argument is again made that the Government failed to prove an understatement of income in the return filed and no act of fraud. As heretofore stated, the evidence fairly justified a finding by the jury that the money received by defendant was income to him. That evidence, coupled with evidence that defendant attempted to conceal a portion of it by not entering it on his books and not reporting a substantial amount in his returns, was sufficient to show the willful filing of a false return. Proof of the willful filing of a false return was sufficient to sustain a conviction under § 145 (b) of a willful attempt to defeat or evade income taxes.[4] **Cave v. United States,** 159 F. 2d 464; **Myres v. United States,** 174 F. 2d 329.

The last assignment is that the court erred in overruling defendant's objection to the revenue agent's testimony in which the agent assumed, for the purpose of calculating the tax due, that the checks heretofore discussed constituted income. The situation here is said to be similar to that in **Kirsch v. United States,** 174 F. 2d 595. That is not correct, for reasons which have been made clear.

The judgment is affirmed.

A true copy.

Attest:

E. E. Koch,
Clerk, U. S. Court of Appeals,
Eighth Circuit.

(Seal)

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[4] We need not and do not consider the effect of the enactment of § 7207 of the 1954 Code with respect to whether proof alone of the willful delivery or disclosure of a false or fraudulent statement or return to the Secretary of the Treasury or his delegate will hereafter, in view of § 7207 making such act a misdemeanor, be sufficient to support a conviction for the felony defined by § 145 (b), now § 7201 et seq. of the 1954 Code.

Judgment.

UNITED STATES COURT OF APPEALS
for the
Eighth Circuit.

No. 15048 . . . September Term, 1954.

Wednesday, January 5, 1955.

Paul Dillon,

Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Paul Dillon, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

January 5th, 1955.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 629

PAUL DILLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 17-29) is reported at 218 F. 2d 97.

JURISDICTION

The judgment of the Court of Appeals (Pet. 30) was entered on January 5, 1955, and a petition for rehearing was denied on February 1, 1955. The petition for a writ of certiorari was filed on February 28, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court should have instructed the jury that petitioner, who had been indicted for the felony of attempted evasion of income taxes, could be convicted of the misdemeanor of filing a false return with intent to defeat the assessment.

2. Whether the trial court should also have instructed the jury that petitioner could be convicted of a misdemeanor for failure to pay a required tax, file a return, or supply information.

3. Whether the evidence was sufficient to justify the verdict.

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

(a) [as amended by Sec. 5(c), Current Tax Payment Act, c. 120, 57 Stat. 126] *Failure to File Returns, Submit Information, or Pay Tax.*—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition

to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

SEC. 3616. PENALTIES.

Whenever any person—

(a) *False Returns.*—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; * * *

* * * * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

(26 U.S.C. 1952 ed., Sec. 3616.)

Federal Rules of Criminal Procedure:

RULE 31. Verdict

* * * * *

(c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

STATEMENT

On November 13, 1953, petitioner was indicted in the United States District Court for the Eastern District of Missouri on charges of wilfully attempting to evade his income taxes for the years 1950 and 1951 by filing fraudulent returns, in violation of Section 145(b) of the Internal Revenue Code of 1939. (R. 1-2.) The amounts of income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		*Corrected*	
	Income	*Tax*	*Income*	*Tax*
Count I (1950)	$1,526.11	$ 32.00	$ 2,526.11	$ 189.00
Count II (1951)	8,022.91	1,642.87	12,656.43	3,264.01

After a jury trial petitioner was found guilty as charged (R. 97-98), and on March 22, 1954, he was

fined $2,500 on the first count and sentenced to imprisonment for fifteen months on each count, the terms to run concurrently (R. 100-101).

The evidence to support the verdict may be summarized as follows:

Petitioner, who is an attorney, recorded the fees he received during 1950 and 1951 in a notebook. (R. 47-51, 58.) For 1950 the total receipts reported in petitioner's return coincided exactly with the sum of the fees recorded in the book. (R. 19, 47.) The 1951 return reported total receipts about $750 in excess of the fees entered in the book. (R. 27, 49-51.)

There was evidence that during 1950 petitioner received $2,000 in additional legal fees which he neither recorded nor reported. The notebook recorded the receipt of $1,000 from one Broadhead in March 1950. (R. 47.) But Broadhead testified that he paid petitioner $2,000 for legal services about March 20, 1950, and that the payment was made, at petitioner's request, in cash. (R. 40-41.) The notebook recorded no receipts during 1950 from Thomas N. Packs. (R. 47.) But the Government introduced a cancelled check in the amount of $1,000 from Packs to petitioner dated March 24, 1950. (R. 31, 33.) Upon the face of the check appears the following caption, "By indorsement this check is accepted in full payment of the following account," beneath which is written the notation, "Legal Services." Both Packs' signature and the indorsement by petitioner were identified

(R. 31, 46), and there was testimony that the checks had been cashed (R. 32).

There was also evidence that during 1951 petitioner received additional fees amounting to about $5,000 which he neither recorded nor reported. The notebook recorded receipts from Packs of $1,500 in January, $284.67 in April, and $1,500 in November. (R. 49-51.) But the Government introduced six cancelled checks from Packs to petitioner for the following amounts: $4,500 in January, $284.67 in April, $3,500 in November, and $742.17 in December. (R. 31, 33-40.) Three of these bear the notation "Fees" or "Legal Services" beneath the caption mentioned in the previous paragraph. Packs' signature and petitioner's indorsement were identified (R. 31, 46), and again there was evidence that the checks had been cashed (R. 32).

The revenue agent who conducted the investigation testified that when he asked for an explanation of the unreported items petitioner stated that they did not constitute income to him. However, he presented no substantiation of this claim to the agent, and although the agent asked to see his cancelled checks for 1950 and 1951 petitioner did not produce them all.[1] (R. 58-59.) Petitioner did not take the stand at the trial and offered no evidence in his own behalf. (R. 61.)

Petitioner requested that the jury be instructed that it might find him guilty of a lesser crime than

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[1] Petitioner's refusal to substantiate his explanation of the unreported items was developed at greater length during a pretrial hearing on his motion to suppress evidence. (R. 8-14.)

that charged in the indictment. Under one of the proposed charges the jury would have been instructed to find him guilty of a violation of Section 145(a) of the Internal Revenue Code of 1939 if it believed that he had wilfully failed to pay taxes, make returns, keep records, or supply information required by law. (R. 92-93.) Under the other proposed charge the jury would have been instructed to find him guilty of a violation of Section 3616(a) of the Internal Revenue Code of 1939 if it believed that he had delivered a false income tax return to the Collector with intent to evade the assessment of the tax. (R. 93-94.) The trial court refused both requests. (R. 92.)

The Court of Appeals unanimously affirmed the conviction. (Pet. 17-30.)

ARGUMENT

1. The second requested instruction refused by the trial court would have permitted the jury to convict petitioner of a misdemeanor under Section 3616(a) of the Internal Revenue Code of 1939, *supra,* pp. 3-4, if it found that he filed a false return with intent to defeat or evade the assesment. The theory of the request was that a violation of Section 3616(a) was necessarily included in the violation of Section 145(b) (*supra,* p. 3) alleged in the indictment. The Court of Appeals, concluding that Section 3616(a) does not apply to income taxes, held that the instruction was properly refused. (Pet. 24-28.) Petitioner contends (Pet. 8-11) that Section 3616(a) *does* apply to income

tax returns, and that the decision below was therefore, erroneous. We agree with the premise, but the conclusion does not follow. Although we believe the reasoning of the Court of Appeals to be incorrect, the ultimate disposition of the appeal was proper, for, in the circumstances of this case, both sections of the Internal Revenue Code punish the same act and there is no question of a "necessarily included" lesser offense.

As petitioner points out (Pet. 8), Section 3616 (a) has frequently been utilized by the Government in the prosecution of income tax cases in which the evidence of wilful evasion, though technically adequate to warrant the institution of proceedings under Section 145(b), discloses an offense of such minor importance as to justify the choice of a misdemeanor charge instead of one sounding in felony. There are, for instance, numerous cases in which small taxpayers evade very small portions of their income taxes by claiming false dependents in their returns. A reluctance to bring felony charges in these cases is easily understood, and the Department of Justice has for some time normally proceeded against such taxpayers under Section 3616(a). We agree with petitioner that this section of the Code has application. We think the language, "with intent to defeat or evade," clearly indicates the necessity for proof of wilfulness; and the enactment of the predecessor of Section 3616(a) in 1864 as part of a Revenue Act which included an income tax,[2] its

[2] Act of June 30, 1864, c. 173, 13 Stat. 223, 225, 226, 281-285.

collocation in the Internal Revenue Code of 1939, and its incorporation in Section 7207 of the Revenue Act of 1954, all point to its applicability to false income tax returns. This position has been tacitly assumed in a number of cases.[3] *Ex parte Cohen,* 191 F. 2d 300 (C.A. 9th), certiorari denied, 342 U.S. 947; *Taylor* v. *United States,* 179 F. 2d 640, 643-644 (C.A. 9th); *Kirsch* v. *United States,* 174 F. 2d 595, 597-598 (C. A. 8th); *Ex parte Berkoff,* 65 F. Supp. 976, 979-981 (D. Minn.); *United States* v. *Koppelman,* 61 F. Supp. 1007, 1008-1009 (M.D. Pa.); see also 10 Mertens, *Law of Federal Income Taxation,* Sec. 55.66.

However, the misdemeanor of filing a false return with intent to defeat the assessment is not a lesser offense "necessarily included" (Rule 31(c), Federal Rules of Criminal Procedure, *supra,* p. 4) within the felony of attempted evasion of income taxes. The theory of the necessarily included offense postulates a gradation in which the greater offense contains some aggravating incident not found in the lesser. 1 Wharton, *Criminal Law* (12th ed., 1932), Sec. 33; and see the cases cited in the petition, page 8, footnote 1. No such aggravating incident is to be found among the elements of Section 145(b) upon comparison

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[3] Although the holding of the court below will to some extent impede the Government's policy of proceeding against minor offenders under the provisions of Section 3616(a), the issue is one of steadily diminishing importance since Section 3616(a) has been replaced by Section 7207 of the Internal Revenue Code of 1954 which, as the Court of Appeals agreed (Pet. 27), clearly has application to income tax returns.

with the elements of Section 3616(a). Petitioner's hesitant suggestion (Pet. 10) that Section 145(b) may require some affirmative act of concealment not required by Section 3616(a) is obviously unsound in view of the express provision of the latter statute prohibiting the affirmative act of delivery or disclosure of a false return. What we have here are two statutes, each of which punishes exactly the same act. Each prohibits a wilful attempt to evade and defeat income taxes. It is true that Section 145(b) is broader in scope, in the sense that it punishes *any* attempt to evade, and a conviction may be obtained under Section 145(b) even though the taxpayer has not filed a false return. *Spies* v. *United States,* 317 U.S. 492, 500; *United States* v. *Smith,* 206 F. 2d 905, 908-910 (C.A. 3d); *United States* v. *Kafes,* 214 F. 2d 887 (C.A. 3d), certiorari denied, 348 U.S. 887. But whenever a taxpayer does file a false return with intent to defeat the tax, the evidence will justify a conviction under either statute. This is only one of many possible ways of attempting to evade taxes.

The concept of the "necessarily included offense" has been defined as follows: "To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser." *House* v. *State,* 186 Ind. 593, 117 N.E. 647, quoted with approval in *Giles* v. *United States,* 144 F. 2d 860, 861 (C.A.9th). The concept has no application in this case. As we have noted, the

felony under Section 145(b) may be committed without perpetrating the misdemeanor under Section 3616(a). On the other hand, one cannot commit the misdemeanor of delivery of a false income tax return with intent to evade the assessment without at the same time committing the felony of attempted income tax evasion.

Petitioner cannot complain because the charge against him was brought under the statute carrying the more serious penalty. As this Court noted in *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 46, "Congress recognized that some methods of attempting to evade taxes would violate other statutes as well." And "the Courts of Appeals have uniformly applied §145(b) to attempts to evade taxes by filing false returns." *Ibid.* No lesser included offense was involved here, and the second requested instruction was properly refused.

2. Petitioner contends (Pet. 11-13) that he was entitled to have the trial court instruct the jury that he could be found guilty of the misdemeanor of failing to pay a required tax, file a return, or supply information. He argues in support of this claim that every violation of Section 145(b) necessarily includes violations of Section 145(a), *supra*, pp. 2-3. The contention is without merit.

It is obvious that the two sections define different offenses, and that not every wilful attempt to evade income taxes (a felony) necessarily involves a default in payment, or an omission to make a return or supply required information (a

misdemeanor). As this Court pointed out in *Spies* v. *United States*, 317 U.S. 492, 499, the felony involves "some willful commission" in contrast with the "willful omissions that make up the list of misdemeanors." The Court of Appeals for the Third Circuit recently adverted to the separate nature of the two offenses in a case in which the taxpayer had been convicted of violation of *both* Section 145(a) and Section 145(b) *for the same year*. *United States* v. *Kafes*, 214 F. 2d 887 (C.A. 3d), certiorari denied, 348 U.S. 887. That Court said (pp. 890-891):

> Sections 145(a) and (b) define separate offenses. Since *Spies* v. *United States*, 1943, 317 U.S. 492, 63 S. Ct. 364, 87 L. Ed. 418, it has been clear that a showing of a failure to file plus other affirmative acts is sufficient to sustain a conviction under section 145(b), but that a willful failure to file alone is not sufficient. See *United States* v. *Smith*, 3 Cir., 1953, 206 F. 2d 905. In the present case, the trial court correctly charged that there was evidence of acts of commission which could supply the needed quantum: for example, defendant's avoidance of making proper books of account and records; his failure to enter some items in the duplicate receipt books that he did finally begin to keep; and the cashing of checks without clearance through his bank account. See *Spies* v. *United States*, *supra*, 317 U.S. at page 499, 63 S. Ct. at page 368.

Nevertheless, the question remains whether, since the section 145(a) violation was used to prove in part the section 145(b) violation, defendant could be convicted for the misdemeanor. The governing rule has been reiterated recently by the Supreme Court in *Pereira* v. *United States,* 1954, 347 U.S. 1, 9, 74 S. Ct. 358, 363: "* * * [D]efendant may be convicted of [two separate offenses] even though the charges arise from a single act or series of acts, so long as each requires the proof of a fact not essential to the other." It is not necessary to prove a failure to file to convict for an attempt to evade; for example, section 145(b) may be violated by the filing of a false return. See *United States* v. *Croessant,* 3 Cir., 1949, 178 F. 2d 96, certiorari denied, 1950, 339 U.S. 927, 70 S. Ct. 626, 94 L. Ed. 1348. Conversely, it is not necessary to show the acts of commission required by the *Spies* case to prove a willful failure to file a return. For further differences, see *O'Brien* v. *United States,* 7 Cir., 51 F. 2d 193, certiorari denied, 1931, 284 U.S. 673, 52 S. Ct. 129, 76 L. Ed. 569. Defendant argues that, even though failure to file a return need not be shown to prove an attempt to evade, the double jeopardy provision is applicable when that failure is in fact used. The short answer to this contention is that the rule itself, as quoted above, sanctions the use of one act as part of the proof of both offenses.

On the present record the separate nature of the two offenses is much more obvious than it was in *Kafes*, for here, as the court below noted (Pet. 24), there was no evidence that petitioner had simply omitted to file a return, pay the tax due, or supply information. What this record shows is a "willful commission"—the filing of a fraudulent return containing false information and the payment of a part of the tax with the representation that no more was due. Consequently, it was not error to refuse petitioner's first request, since no instruction should be given on a lesser included offense where there is no evidence to justify it. *Davis* v. *United States*, 165 U.S. 373, 378-379; *Sparf and Hansen* v. *United States*, 156 U. S. 51, 63; *Burcham* v. *United States*, 163 F. 2d 761, 762 (C. A. D. C.).

3. There is no merit in petitioner's final contention (Pet. 13-15), that the evidence was insufficient to support the verdict. When the seven Packs checks were introduced, both the signature of Packs and petitioner's indorsement were properly identified and there was additional testimony that they had been cashed. (R. 31, 32, 46.) Petitioner's notebook recorded a portion of these sums as the receipt of legal fees from Packs, thus establishing the attorney-client relationship between them. (R. 49-51.) Moreover, some of the checks specifically purported to be payment for legal services. (R. 33-37.) Petitioner's indorsement of the checks constituted an admission of this fact, and, though afforded the opportunity by the agents

during the investigation, he failed to produce any substantiation for his claim that the unrecorded and unreported amounts did not constitute income to him. (R. 58-59.) Since the receipt of unreported income was clearly indicated by competent evidence, the Government was not bound to show more.[4] See *Holland* v. *United States*, 348 U. S. 121, 138; *Rossi* v. *United States*, 289 U. S. 89, 91-92.

Petitioner contends that this evidence was insufficient in view of the fact that the Government failed to avail itself of the direct testimony of Packs, despite the fact that he was present in the courtroom. There is speculation (Pet. 14) that the Government must have found that Packs would have testified that the amounts in question were not income to petitioner. But Packs was equally available to petitioner, and the much more probable explanation is that Packs had told conflicting stories during the investigation with the result that neither side was willing to vouch for his veracity as a witness. The Government is not, of course, required to put a hostile witness on the stand. The failure to produce Packs afforded grounds for argument to the jury, but it did not detract from the substantiality of the Government's prima facie case.

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[4] Petitioner does not challenge the sufficiency of the evidence as to the unreported $1,000 received from Broadhead in 1950. This is sufficient to support the conviction in itself, since the total sentence imposed is within the maximum allowable under any one count. *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U.S. 640, 641-642.

CONCLUSION

The judgment of the Court of Appeals is correct, and the petition presents no issue requiring further review. The petition for certiorari should be denied.

Respectfully submitted,

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MARCH, 1955.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 629.

PAUL DILLON,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

ARGUMENT.

The Government's interpretation is that Section 3616 (a) and Section 145 (b) are "two statutes each of which punishes exactly the same act. Each prohibits a wilful attempt to evade and defeat income taxes." The Government further says: "that whenever a taxpayer does file a false return with intent to defeat the tax, the evidence will justify a conviction under either statute." Since the

instant indictment, in each count, merely charges an attempt to evade and defeat income taxes by the sole means of filing a false and fraudulent return, a violation of both statutes is charged, as under the Government's position, such facts constitute both a misdemeanor in violation of § 3616 (a) and such facts, without more, constitute a felony in violation of § 145 (b). In **Williams v. United States**, 168 U. S. 382, 389, it is said:

> "It is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment if the charges made are embraced by some statute in force. The indorsement on the margin of the indictment constitutes no part of the indictment and does not add to or weaken the legal force of the averments. We must look to the indictment itself, and if it properly charges an offense under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute."

The only way that it can be said that a defendant under such circumstances knows the nature of the accusation is to say that he is charged under both statutes. The Government's argument that defendant is not entitled to a lesser offense instruction because the words "necessarily included" in Rule 31 (c) only mean that the lesser offense must be necessarily included in the statutory definition of the greater offense leads to the conclusion that under an indictment, such as the instant one, which can be construed as charging either a misdemeanor or a felony, defendant can only be convicted of a felony.

The Government overlooks the fact that in jurisdictions where "necessarily included" is construed in this manner, there is an exception. Where an indictment charges not only the major offense, but also in terms charges a lesser

offense, accused may be convicted of the lesser offense even though it does not form a constituent part of the major offense charged. In **Stapleton v. Commonwealth**, 140 Va. 475, 124 S. E. 237, 240-241, it is said:

> "The case does not fall within the control or influence of such cases as the Hardy and Curry Case, 17 Grat. (58 Va.) 592, strongly relied on for the accused, in which the indictment in terms charges only one major offense, which is held to also embrace the charge of all lesser offenses which are incident to and constitute elements of the major offense. In such cases, only such lesser offense as are in their nature constitutent parts of the major offense can be considered as charged in the indictment, and conviction of such character of lesser offense only can be had and enforced under such an indictment. But such an indictment as that in the instant case is not one which in terms charges only one major offense. It in terms charges both the major and the lesser offense in question, and the conviction of the lesser offense charged may be had and enforced under such an indictment, because, as aforesaid, the indictment contains a competent specific charge of the lesser offense at common law, and not because the lesser offense is of such character that it is an element of the major offense charged."

The rule is established that a defendant may only be convicted of two separate offenses arising from a single act if each requires proof of a fact not essential to the other. **Pereira v. United States**, 1954, 347 U. S. 1. Here, however, under the Government's interpretation, a violation of both statutes does not require proof of any facts not essential to the other. Significantly, the Government does not say that a defendant could be convicted under both statutes as it does in its argument concerning 145 (a).

The Government says that it utilizes § 3616 instead of § 145 (b) where "small taxpayers evade small portions of their income taxes . . ." The amounts alleged to be underestimated in the instant case are relatively small, $157.00 for 1950 and $1,621.14 for 1951. The prosecuting officials should not be given the sole discretion to determine what statute was violated but that question should be left to the jury. Therefore when an indictment may be construed to charge a felony or misdemeanor, a more reasonable construction of Rule 31 (c) is that the lesser offense is "necessarily included in the offense charged" since there is as much cause to give a lesser offense instruction as when the lesser offense differs from the greater merely because it lacks an element contained in the latter.

Rule 31 (c) says that a defendant may be found guilty of "an offense necessarily included in the offense charged." A similar provision has been construed to mean that the lesser offense must be included in the acts set forth in the indictment as constituting the crime for which defendant is charged rather than a construction requiring the lesser offense to be included in the statutory definition of the crime for which defendant is indicted. **People v. Miller**, 143 App. Div. 251, 128 N. Y. S. 549, 550, affd., 202 N. Y. 618, 96 N. E. 1125; **People ex rel. Poulous v. McDonnell**, 302 N. Y. 89, 96 N. E. 2d 614. There are two good reasons for such interpretation. The first is stated in the **Poulous** case as follows (302 N. Y. at 91, 96 N. E. 2d at 615):

> "It is the statutory as well as a common law rule that a prosecution ought not to fail for lack of proof that the crime charged is shown to have been committed in a lesser degree than charged in the indictment; in such case the jury may find the defendant guilty of the lesser degree."

The other reason is that the prosecuting officials should not have absolute discretion to decide the offense of which the accused may be found guilty.

Even if the lesser offense must be necessarily included in the statutory definition of the crime for which defendant is indicted, defendant was still entitled to instructions as to the lesser offenses. The phrase, "in any manner," as used in Section 145 (b) is not employed in a vacuum but has to be considered in relationship to the entire tax structure and the possible methods of tax evasions. Section 3616 forbids not only the delivery of "any false or fraudulent list, return account or statement" but also proscribes against the disclosure of such items. Since every reported tax evasion case either contains a false statement or false disclosure to a Government representative, Section 3616 is as broad in fact as Section 145 (b). **United States v. Kafes**, 3 Cir., 214 F. 2d 887, and **United States v. Smith**, 3 Cir., 206 F. 2d 905, are the two reported cases affirming convictions for tax evasions where no tax returns were filed. Defendant in the **Kafes** case did not keep proper books of account and therefore one can infer that he disclosed a false account to a Government representative in violation of Section 3616. And in **Smith**, defendant made false representations to revenue agents and altered his records which undoubtedly led to a false disclosure. The illustrative methods of tax evasion set forth in **Spies v. United States**, 317 U. S. 492, 499, would all constitute violations of Section 3616.

Assuming further that Section 3616 is not as broad as Section 145 (b), a lesser instruction still should have been given. Section 3616 and Section 145 (a) should be considered as if they were one statute. Considering these statutes as one, it is clear that there can be no violation of Section 145 (b) without violating these combined misdemeanor provisions. Embraced in every violation of the

major offense is a lesser dereliction. Whether a lesser offense instruction is required should not rest on the narrow ground that these two misdemeanor sections are in two different statutes as the same Congressional intent is involved whether they are embodied in the same or different statutes.

CONCLUSION.

For the reasons set out above and those set out in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 37.

PAUL DILLON,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR THE PETITIONER.

OPINION BELOW.

The opinion of the Court of Appeals (R. 111-122) is reported at 218 F. 2d 97.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 5, 1955 (R. 122), and a petition for rehearing was denied on February 1, 1955 (R. 122). The petition for a writ of certiorari was filed on February 28, 1955, and was granted on April 25, 1955. The jurisdiction of this Court was invoked under 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED.

1. Whether the trial court should have instructed the jury that petitioner, who had been indicted for the felony of attempted evasion of income taxes (according to the statute cited in the indictment), could be convicted of the misdemeanor of filing a fraudulent return with intent to defeat the assessment.

2. Whether the trial court should also have instructed the jury that petitioner could be convicted of a misdemeanor for failure to pay a required tax, make a return, keep records, or supply required information.

3. Whether in a prosecution of a lawyer for evading his own income tax based on specific items of income alleged to be unreported, the burden of proof or the burden of going forward with the evidence may be shifted to the defendant by merely having a witness identify seven checks payable to and endorsed by the defendant, two of which are marked "fees," two marked "legal services," and the rest not marked, when the maker of the checks is available in the courtroom, and there has been offered no evidence concerning the relationship between the maker and the taxpayer, or as to when the markings were placed on the checks.

STATUTE AND RULE INVOLVED.

Internal Revenue Code of 1939:

Sec. 145. Penalties.

(a) [as amended by Sec. 5 (c), Current Tax Payment Act, c. 120, 57 Stat. 126] **Failure to File Returns, Submit Information, or Pay Tax.**—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) **Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.**—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * * *

(26 U. S. C., 1952 ed., Sec. 145.)

Sec. 3616. Penalties.

Whenever any person—

(a) **False Returns.**—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; • • •

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he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

(26 U. S. C., 1952 ed., Sec. 3616.)

Federal Rules of Criminal Procedure:

Rule 31. Verdict.

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(c) **Conviction of Less Offense.** The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

STATEMENT.

Petitioner, a 77-year-old Missouri lawyer, was indicted on charge of wilfully attempting to evade his income taxes for the years 1950 and 1951 by filing fraudulent returns. The statute alleged to be violated on the face of the indictment was Section 145 (b) of the Internal Revenue Code of 1939 (R. 1-2). The amounts of income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1950)	$1,526.11	$ 32.00	$ 2,526.11	$ 189.00
Count II (1951)	8,022.91	1,642.87	12,656.43	3,264.01

After a jury trial petitioner was found guilty as charged (R. 97-98). He was sentenced to imprisonment for fifteen months on each count, the terms to run concurrently, and was fined $2,500.00 on the first count (R. 100-101).

The evidence of the government may be summarized as follows:

Petitioner recorded the income he received during 1950 and 1951 in a book (Pl. Exs. 14, 15, 16; R. 47-51, 46, 58). For 1950 the total receipts reported in petitioner's tax return coincided exactly with the sum of the income recorded in the book (Pl. Ex. 1; R. 17-21, 16, 19, 47, 52). The 1951 return reported total receipts about $999.08 in excess of the income entered in the book (Pl. Ex. 2; R. 23-29, 22, 27, 49-51, 52). The case was prosecuted on the theory that in 1950 petitioner's book did not reflect all of his income from two individuals named Broadhead and Packs, and in 1951 from Packs alone and consequently the returns understated his true income. The evidence was presented in

about two hours and consisted principally of the testimony of three witnesses, Broadhead, a Pack's employee and the Internal Revenue Agent.

The Government's position was that during 1950 petitioner received $2,000 in legal fees which were neither recorded nor reported. Petitioner's books showed $1,000 received from Broadhead in March, 1950, and $1,250 received from him in June, 1950 (R. 47). Petitioner had represented Broadhead as an attorney in a case pending in Mississippi from 1949 to 1951 (R. 50). Broadhead paid him $2,000 in cash in March, 1950, and $1,250 by check in June, 1950 (R. 40). But Broadhead testified that petitioner brought in a Mississippi attorney as associate counsel and admitted that the fees of such associate attorney were not paid by Broadhead (R. 42). Moreover, Broadhead knew that the Mississippi attorney was going to be paid and that it was petitioner's responsibility to pay him. He did not know anything about the financial arrangements between petitioner and associate counsel. Associate counsel, moreover, attended every meeting that Broadhead had with petitioner and appeared in court for Broadhead (R. 41-42).

The employee of Packs (Thomas Packs Amusement Enterprises Company) identified seven cancelled checks of that concern payable to petitioner during the years 1950 and 1951, signed by Packs and endorsed by petitioner (R. 31, 33-39). But the employee had no business dealings with petitioner and did not state or know the reason for the issuance of the checks. He merely identified the checks as company records and could not testify of his own knowledge that money was paid to petitioner (R. 31-32). Moreover, Tom Packs did not testify although he spoke to the Revenue Agent handling the case in the hall near the courtroom during the trial (R. 59). Two checks were marked "Fees" (Pl. Exs. 8, 9; R. 37, 46), two of

the checks, including the only one that related to the year 1950, were marked "Legal Services" (Pl. Exs. 4, 7; R. 33, 35, 46), and the other three had no markings of purpose (Pl. Exs. 5, 6, 10; R. 33, 35, 39, 46). There was no testimony as to when these checks were so marked. Petitioner's books showed no income from Packs in 1950; they indicated income from Packs in 1951 in the amounts of $1,500 in January, $284.67 in April, and $1,500 in November (R. 49-51). The seven cancelled checks were in the following amounts: $1,000 in March, 1950, $4,000 and $500 on December 30, 1950, $284.67 in April, 1951, $3,000 and $500 in November, 1951, and $742.17 in December, 1951 (R. 33-40). The December 30, 1950, checks were received in 1951 (R. 44). The government's theory was that two of the checks were not entered in petitioner's records (Pl. Exs. 4, 10); that four of the checks were understated (Pl. Exs. 5, 6, 8 and 9) and that one was correctly entered (Pl. Exs. 7, 52-53). No other evidence was offered concerning either the relationship of petitioner and Packs or the purpose of these checks.

The only evidence of the remainder of petitioner's income was petitioner's records (Pl. Exs. 14, 15, 16; R. 47-51). The revenue agent who conducted the investigation testified that when he asked for an explanation of the unreported items petitioner stated that they did not constitute income to him and that he only recorded in his books those items which he considered to be income. Petitioner gave an explanation why the other items were not income which the agent said was not substantiated (R. 58-59). Petitioner did not take the stand at the trial and offered no evidence in his own behalf (R. 61).

Petitioner requested that the jury be instructed that it might find him guilty of a lesser crime than the one cited in the indictment. Under one of the proposed charges the jury would have been instructed to find him guilty of a

violation of Section 3616 (a) of the Internal Revenue Code of 1939 if it believed that he had delivered a false income tax return to the Collector with intent to evade the assessment of the tax (R. 93-94). Under the other proposed charge the jury would have been instructed to find him guilty of a violation of Section 145 (a) of the Internal Revenue Code of 1939 if it believed that he had wilfully failed to pay taxes, make returns, keep records, or supply information required by law (R. 92-93). The trial court refused both requests (R. 92).

The Court of Appeals unanimously affirmed the conviction (R. 111-122), holding that no lesser instruction was required because Section 3616 (a) was inapplicable to income tax violations (R. 117-121) and that a Section 145 (a) violation was not supported by the evidence (R. 116-117). The Court held, in regard to the seven Packs checks, that the foundation offered by the Government fully indicated that the receipts were income and that the transfer of the burden of proof or the burden of going forward with the evidence to the defendant was proper because there was a manifest disparity in convenience of proof and opportunity of knowledge between the defendant and the Government (R. 112-115).

SUMMARY OF ARGUMENT.

1. Section 3616 (a) of the Internal Revenue Code of 1939 applies to income tax derelictions. The Government so conceded in its brief opposing certiorari. It has frequently been utilized in the prosecution of income tax cases. The language "with intent to defeat or evade" clearly indicates the necessity for proof of wilfulness. The enactment of the predecessor of Section 3616 (a) as part of a Revenue Act which included income tax, its collocation in the Internal Revenue Code of 1939, and its incorporation in Section 7207 of the Internal Revenue Code of 1954 all indicate its applicability to fraudulent income tax returns. The Government also conceded that Section 3616 (a) prohibits a wilful attempt to evade income taxes by filing fraudulent returns. This view is supported by the plain language of Section 3616 (a) in proscribing against the filing of "fraudulent" returns "with intent to defeat or evade . . . the assessment." Section 145 (b) also forbids a wilful attempt to evade income tax by filing fraudulent returns.

Under an indictment, citing Section 145 (b) of the Internal Revenue Code of 1939, a felony, and charging an attempt to evade income taxes by filing a false and fraudulent return, the trial court should have instructed the jury, as requested, that defendant could be convicted of the misdemeanor under Section 3616 (a) which section, as conceded by the Government, specifically prohibits the filing of a false and fraudulent return for the purpose of evading taxes. A violation of the lesser offense was charged in the indictment. It was "necessarily included" in the allegations of the indictment under Rule 31 (c) of the Federal Rules of Criminal Procedure which authorizes a conviction for an offense "necessarily included in the offense charged" by being included in the acts alleged in the indictment and was thus sufficiently charged. A de-

fendant is informed of the "essential facts constituting the offense" by the allegations of the indictment and not by the statute cited or by the statutory definition of the greater offense. The prosecution is not limited to the statutory citation but may have every offense sufficiently charged submitted. The accused should have the same right. Moreover, the prosecution ought not to fail when it fails to prove an allegation charged if it proves sufficient facts constituting a crime of which defendant has had notice. There are state court decisions supporting this interpretation and a contrary rule has not been established by the Courts of Appeal.

Moreover, the Government concedes that a violation of Section 3616 (a) was charged by saying that Sections 3616 (a) and 145 (b) are "two statutes, each of which punishes exactly the same act." If there is no difference between the misdemeanor and the felony under the instant indictment defendant cannot be punished twice for the same acts by two statutes when the proof required for conviction is the same. And punishment for the same offense may be graver only if there is a rational basis for different treatment. State statutes allowing different punishment have been stricken down as discriminatory. Allowing punishment only under the lesser range of penalties would avoid such discrimination. It would be in accord with **United States v. Universal C. I. T. Credit Corp.**, 344 U. S. 218, which limited the amount of punishment where the Congressional intent was not clear.

The difference between a Section 3616 (a) and a Section 145 (b) violation may be that the felony requires other affirmative acts of fraud in addition to the mere filing of fraudulent returns. This rule would give effect to both statutes. A contrary holding would in effect render nugatory Section 3616 (a) if under an indictment such as the instant one, the punishment may be for the greater offense. Although **United States v. Beacon Brass Co.**, 344

U. S. 43, has said that an attempt to evade taxes "in any manner" includes the filing of a fraudulent return, it did not consider Section 3616 (a). There may be differences in degrees of wilfulness. Or the aggravating incident in the greater may be a substantial understatement of income as opposed to smaller deficiencies.

Even if a "necessarily included" offense must be embraced within the statutory definition of the greater offense, the misdemeanor under Section 3616 (a) is embraced within the greater offense of Section 145 (b). Although Sections 3616 (a) and 145 (b) are couched in different language, they cover the same type of derelictions. But if Section 3616 (a) is narrower in scope than 145 (b), it together with Section 145 (a) of the Internal Revenue Code covers the same ground as 145 (b).

2. Alternatively, the trial court should have permitted the jury to convict petitioner of a misdemeanor under Section 145 (a) of the Internal Revenue Code if it found he wilfully failed to pay taxes, make a return or supply information required by law. It is impossible to violate Section 145 (b) without offending against Section 145 (a) as every wilful attempt to evade taxes necessarily includes one or more of these misdemeanors. The felony proscribed by Section 145 (b) includes other offenses against the revenue laws. **Spies v. United States,** 317 U. S. 492. The aggravating incident for the greater offense, if required, would be some act of willful commission. A lesser instruction was supported by the evidence. Again if Section 145 (a) and Section 3616 (a) are treated as one statute, a lesser instruction is clearly required.

The burden of going forward with the evidence should not have been shifted to petitioner by the mere identification of the seven Packs checks when the maker of the checks was present in the courtroom but was not called as a witness by the Government, as the mere receipt of money

by a lawyer does not indicate income absent other circumstances indicating that it was income. It is true that the "prosecution does not have to adduce evidence to support a negative averment" when its truth could be disproved by evidence probably in defendant's control. But the Government's case must be independently established to some extent and there must be a "manifest disparity in convenience of proof and opportunity for knowledge" and "a serious practical handicap" if the prosecution must prove the proposition. Such was not the case because of the availability of Packs. The Government failed to show the investigation into leads required by **Holland v. United States**, 348 U. S. 121. Unless Packs told the revenue agent that the sum of the checks were income, petitioner's statement that the sum of these checks was not income should have been accepted. If Packs told the contrary, he should have been called as a witness. There was no evidence as to when the markings "fees" or "legal services" were placed on four of the checks. There should, therefore, be no implied admission by petitioner's endorsement. The markings were hearsay as no foundation was laid for admission under the Business Records Statutes. Moreover, the reference in petitioner's books to Packs and the date of receipt of all but two checks (one of which had no markings) shows an innocent intent. At least it was error to admit into evidence the three checks which had no markings of purpose. In the absence of these checks, the jury would also have found no criminal intent in 1950.

ARGUMENT.

I.

Section 3616 (a) of the Internal Revenue Code of 1939, a misdemeanor which forbids the filing of a fraudulent return with intent to defeat the assessment is "necessarily included in the offense charged" under an indictment charging an attempt to evade income taxes by filing a fraudulent return, a felony under Section 145 (b) of the Internal Revenue Code of 1939, the statute indorsed on the indictment, and the trial court should have instructed the jury, as requested, that petitioner could be convicted of the lesser offense.

The trial court refused a requested instruction which would have permitted the jury to convict petitioner of a misdemeanor under Section 3616 (a) of the Internal Revenue Code of 1939. The court below affirmed the conviction holding that defendant was not entitled to a lesser offense instruction because Section 3616 (a) was inapplicable to income tax violations. The court concluded "both from the language of § 3616 and the statutory context where it was formally placed, that it was never intended to apply to income tax violations" (R. 120). The court, in reaching this result, found that Section 7207 of the 1954 Internal Revenue Code which replaced Section 3616 was broad enough to apply to income tax derelictions and that the "element of willfulness, absent in § 3616 but previously consistently present in offenses relating to income tax violations, was inserted" (R. 120).

But the Government has conceded in its brief in opposition to the petition for certiorari that Section 3616 (a) does apply to income tax returns and that the court below was wrong in this premise. Brief for the United States in

Opposition, pp. 7-8. Section 3616 (a) has frequently been utilized by the government in the prosecution of income tax cases. The language "with intent to defeat or evade" clearly indicates the necessity for proof of wilfulness. Moreover, the mere omission of the word "wilful" in a criminal statute would not eliminate intent as an element of the offense. **Morissette v. United States,** 342 U. S. 246. The predecessor of Section 3616 was enacted in 1864 as part of a Revenue Act which imposed an income tax and provided for income tax returns.[1] Section 3616 is collocated in the Internal Revenue Code of 1939 next to Sections 3614 and 3615 which authorize the issuance of summons for the inspection of records for the determination of tax liability, including income tax liability. These all point to its applicability to fraudulent income tax returns. Section 3616 is incorporated into Section 7207 of the Revenue Act of 1954 which the court below found applied to income tax derelictions. It overlooked the fact however, that both the Senate and House Committee Reports relative to Section 7207 state that it did not change existing law.[2]

The applicability of Section 3616 to fraudulent income tax returns has been tacitly assumed in a number of cases. **Ex parte Cohen,** 9 Cir., 191 F. 2d 300, certiorari denied, 342 U. S. 947; **Taylor v. United States,** 9 Cir., 179 F. 2d 640, 643-644; **Kirsch v. United States,** 8 Cir., 174 F. 2d 595, 597-598; **Slick v. United States,** 7 Cir., 1 F. 2d 897; **Ex parte Berkoff,** D. Minn., 65 F. Supp. 976, 979-981;

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[1] Act of June 30, 1864, c. 173, 13 Stat. 223, 225, 226, 281-285. § 3616 was more immediately derived from R. S. § 3179.

[2] The Senate Report states: "This section, which is identical with the House Bill contains no material change in existing law." S. Rep. No. 1622, 83rd Cong., 2nd Sess. (1954) 603, 1954 U. S. Code Congressional Service 3251. The House Report is identical. H. R. Rep. No. 1337, 83rd Cong., 2nd Sess. (1954) A. 425, 1954 U. S. Code Congressional Service 1111.

United States v. Koppelman, M. D. Pa., 61 F. Supp. 1007, 1008-1009.

In regard to Section 3616 (a) the Government has also conceded that this statute specifically punishes a wilful attempt to defeat income taxes by filing fraudulent returns. The Government said in regard to both Section 3616 (a) and Section 145 (b) that they are "two statutes, each of which punishes exactly the same act. Each prohibits a wilful attempt to evade and defeat income taxes . . . whenever a taxpayer does file a false return with intent to defeat the tax, the evidence will justify a conviction under either statute." Brief for the United States in Opposition, p. 10. Section 3616 (a) makes it an offense to deliver or disclose to the collector "any false or fraudulent . . . return . . . with intent to defeat or evade the valuation, enumeration or assessment . . ." A "false" return by itself might be a return which is merely incorrect due to negligence or some other cause lacking intent and would not necessarily involve an attempt to evade taxes if it were delivered to the taxing authorities. But a "fraudulent" return would include an intent to deceive and an intent to deprive the government of taxes. A "false or fraudulent" return could by a strained construction refer to a false return only. Cf. **Rick v. United States**, D. C. Cir., 161 F. 2d 897. However, anyone who delivers or discloses a false or fraudulent return "with intent to defeat or evade the . . . assessment" is attempting to defeat and evade his taxes. There can be no real difference between this language employed in these sections. Consequently Section 145 (b) and Section 3616 (a) both prohibit a wilful attempt to evade and defeat income taxes and both offenses were charged under the instant indictment if **United States v. Beacon Brass Co.**, 344 U. S. 43, 46, is correct in holding the felony includes evasion by means of a fraudulent return.

Under Rule 31 (c) a lesser offense must be "necessarily included in the offense charged."[3] The Government's position is "To be necessarily included in the greater offense the lesser offense must be such that it is impossible to commit the greater without first having committed the lesser," or, in essence, that the lesser offense must be included in the statutory definition of the greater offense. The Government says that Section 3616 (a) is not so included in Section 145 (b) because the felony may be committed without perpetrating the misdemeanor and that "one cannot commit the misdemeanor of delivery of a false income tax return with intent to evade the assessment without at the same time committing the felony of attempted income tax evasion." Brief for the United States in Opposition, pp. 10-11. We believe that reason supports the interpretation that the language employed in Rule 31 (c) comprehends that a lesser offense is "necessarily included" if it is fairly charged by the indictment. A lesser offense is fairly charged if it is included in the acts alleged in the indictment as constituting the greater offense whether or not the greater may be committed without perpetrating the lesser.[4]

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[3] Under a charge of murder, defendant may be convicted of manslaughter. *Stevenson v. United States*, 162 U. S. 313, 315; *Wallace v. United States*, 162 U. S. 466, 472. Under an indictment charging robbery, defendant may be convicted of larceny. *Lamore v. United States*, D. C. Cir., 136 F. 2d 766. A suggestion as to its application under the Gambler's Occupational Tax Act, 26 U. S. C. A., former §§ 3294 (c), 2707 (b) is found in *United States v. Kahringer*, 3 Cir., 210 F. 2d 565, 571-572.

[4] Rule 31 (c) was a restatement of existing law, 18 U. S. C. A., former § 565, which provided:

> "In all criminal causes the defendant may be found guilty of any offense the commission of which is *necessarily included in that with which he is charged* in the indictment, or may be found guilty of an attempt to commit the offense so charged, if such attempt be itself a separate offense."

The emphasized portion contains no suggestion of the limitation urged by the government.

It is elementary that an accused must be given fair warning of the charges facing him. The nature of his accusation is learned from the allegations of the indictment and not from any particular statute.[5] "It is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment if the charges made are embraced by some statute." **Williams v. United States**, 168 U. S. 382, 389.[6] Indeed the accused must be prepared to defend in one count of an indictment against allegations which may constitute violations of several statutes. In **United States v. Tommasello**, 2 Cir., 160 F. 2d 348, 351, one count of the indictment was drawn under a particular statute, but stated facts sufficient to plead an offense under two other statutes as well. The court held that a conviction might be had under any of the three statutes.

Since the prosecution is not limited to the statutory citation in the indictment where the language is sufficient to charge still another or other offenses, the defendant is entitled to have each such other offense submitted to the jury even if it is lesser in nature. Failure to charge as to each such offense supported by the evidence might well result in a verdict of guilt on a major offense because the jury believes the defendant guilty of only certain elements of wrongdoing but when left with the alternative of either entirely acquitting him or convicting him, they will find guilt on the only offense submitted.

The construction urged aids the prosecution as well as the accused. There are occasions where a defendant is

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[5] Rule 7 (c), Federal Rules of Criminal Procedure, states in part: "The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

[6] The word "feloniously" in the indictment probably does not add to the allegations since its omission does not affect the accusation. *United States v. Staats*, 8 How. 41, 49 U. S. 41; *United States v. Amorosa*, 3 Cir., 107 F. 2d 596, 598.

shown to be guilty of some wrong doing but his derelictions are not so aggravating as to support every allegation in the indictment. The proof may fail as far as one of the elements charged is concerned. Under such circumstances the defendant should not be acquitted and then tried anew for the lesser violation. The prosecution should request a lesser offense instruction. There is more reason for this view than one requiring him to defend against the statutory definition of the major crime charged. There is no injustice to require him to face the remainder of the allegations in the indictment. "It is the statutory as well as a common law rule that a prosecution ought not to fail or the lack of proof that the crime charged is shown to have been committed in the lesser degree than charged in the indictment." **People ex rel. Poulous v. McDonnell**, 302 N. Y. 89, 91, 96 N. E. 2d 614, 615.

We do not believe any contrary rule has been established by the various circuits. The Ninth Circuit in **Giles v. United States**, 144 F. (2d) 860, 861, quoted with approval the following definition of necessarily included offense as used in **House v. State**, 186 Ind. 593, 117 N. E. 647: "To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser." It should be noted that in **Giles** there was no evidence to support the lesser offense and no such instruction was requested.

However, in **Barbeau v. United States**, 193 F. (2d) 945, 946-948, the Ninth Circuit held that negligent homicide was included under a first-degree murder charge, which alleged purposeful killing, with deliberation and premeditation. It is not impossible to commit first-degree murder without first having committed a negligent homicide. And the killing of a person by negligence is not necessarily included in the statutory definition of murder in the first degree, which is a killing done purposely with deliberation

and premeditation. The most that can be said is that the lesser offense was fairly charged in the indictment.

In **Gaunt v. United States**, 1 Cir., 184 F. 2d 284, 289-290, one count of the indictment charged an attempt to evade income taxes by filing a fraudulent return. Another count charged the making of fraudulent statements within the jurisdiction of a department of the United States by filing a fraudulent income tax return in violation of 18 U. S. C. A., former § 80 (now 18 U. S. C. A., § 1001). The court held that the latter charged a crime within the crime charged in the former. If this offense is embraced within Section 145 (b), a fortiori, Section 3616 (a) is so embraced.

There are state decisions which hold that the lesser offense may be included in the acts set forth in the indictment. **People v. Miller**, 143 App. Div. 215, 128 N. Y. S. 549, 550, affd., 202 N. Y. 618, 96 N. E. 1125; **People ex rel. Poulous v. McDonnell**, supra. In jurisdictions where "necessarily included" is construed to mean that the lesser offense must be included in the statutory definition of the greater offense, there is an exception. Where an indictment charges not only the major offense, but also in terms charges a lesser offense, the accused may be convicted of the lesser offense even though it does not form a constituent part of the major offense charged. In **Stapleton v. Commonwealth**, 140 Va. 475, 124 S. E. 237, an indictment charged both burglary and larceny and the defendant was convicted of larceny alone. The court found that although larceny was not a constituent part of burglary, a conviction for the lesser crime of larceny was proper. The court there said (124 S. E. at 240-241):

> "The case does not fall within the control or influence of such cases as the Hardy and Curry Case, 17 Grat. (58 Va.) 592, strongly relied on for the accused in which the indictment in terms charges only one major offense, which is held to also embrace the charge

of all lesser offenses which are incident to and constitute elements of the major offense. In such cases, only such lesser offense as are in their nature constituent parts of the major offense can be considered as charged in the indictment, and conviction of such character of lesser offense only can be had and enforced under such an indictment. But such an indictment as that in the instant case is not one which in terms charges only one major offense. It in terms charges both the major and the lesser offense in question, and the conviction of the lesser offense charged may be had and enforced under such an indictment, because, as aforesaid, the indictment contains a competent specific charge of the lesser offense at common law, and not because the lesser offense is of such character that it is an element of the major offense charged."

The view that the greater offense must be embraced within the statutory definition of the lesser or that the allegations of the indictment describing the manner in which the greater offense was committed must contain allegations essential to constitute a charge of the lesser is followed by other states. **Watson v. State**, 116 Ga. 607, 43 S. E. 32; **Moore v. State**, 151 Ga. 648, 662, 663, 108 S. E. 47, 54; **Barton v. State**, 58 Ga. App. 554, 199 S. E. 357.

In the instant case since the Government says that Sections 3616 (a) and 145 (b) are "two statutes, each of which punishes exactly the same act", the allegations of the indictment charged both the greater and the lesser offenses. The lesser was therefore "necessarily included" as it was fairly charged by being included in the averments of the indictment.

It does not follow that petitioner could only be convicted of the greater offense if the Government is correct in its contention that there is no difference between the misdemeanor and the felony under the instant indictment.

If such be the case, the court should have instructed the jury that defendant could only be convicted of the lesser offense. For if there be no difference, defendant could not be punished under both statutes without offending the double jeopardy provision under the fifth amendment to the United States Constitution.[7] A defendant may be convicted of two separate offenses arising from a single act only if each requires proof of a fact not essential to the other. **Pereira v. United States**, 347 U. S. 1, 9; **United States v. Beacon Brass Co.**, 344 U. S. 43, 45.

When the crimes committed by different individuals are the same, they must be punished in the same manner, by the same range of punishment. Punishment for the same offense may be more severe only if there is a rational basis for difference in punishment such as a prior conviction. E. g., **Moore v. Missouri**, 159 U. S. 673, 678; **Commonwealth of Pennsylvania ex rel. Sullivan v. Ashe**, 302 U. S. 51, 54. An unreasonable discrimination in punishment among defendants would violate the due process clause of the Fifth Amendment to the United States Constitution. In **State v. Cory**, 282 P. 2d 1054 (Or. 1954), a portion of a habitual criminal act giving the district attorney unlimited discretion to determine whether he will or will not proceed against a person who had previously been convicted of a felony was held to deny equal protection of the law because there was no classification to determine under what circumstances the information should be filed. And in **State v. Pirkey**, 281 P. 2d 698 (Or. 1954), a statute which delegated to grand jury or magistrate power to determine in advance whether to charge a defendant with a felony or a misdemeanor for the same offense

[7] Of course, if there is an aggravating incident distinguishing the greater and lesser offenses and both offenses are submitted to the jury, punishment may be under the more inclusive count if a defendant is either found guilty of the greater offense or found guilty of both. *Ekberg v. United States*, 1 Cir., 167 F. 2d 380, 385-386.

without fixing a standard for the exercise of that discretion was held to violate the equal protection clause of the state and federal constitution and an indictment drawn pursuant to such statute was dismissed.

Less drastic would be the choice of the lighter range of punishment. In determining the unit of punishment, **United States v. Universal C. I. T. Credit Corp.**, 344 U. S. 218, 221-222, held that before a court should choose the harsher alternative, Congress should be required to have spoken "in language that is clear and definite." Such a choice here would be in accord with the rule of strict construction of criminal statutes in favor of the accused. This would end the only discrimination of which a defendant could complain. It would also prevent an implied repeal of Section 3616 (a). Prosecutions under Section 145 (b) could still be had if the indictment alleged acts of concealment if such acts are not also covered by Section 3616. At the very least, the choice should be left to the petit jury.

If a wilful attempt to evade taxes by filing a fraudulent return under Section 145 (b) contains some aggravating incident not found in the same offense under Section 3616 (a), the incidents that we conceive would not preclude a lesser offense instruction. The difference may be dependent on the taxpayer's state of mind. It may be analogous to the difference between murder and manslaughter, which is dependent on the amount of deliberation prior to the act of homicide. Elaborate schemes of concealment would probably be present in the felony while single and sporadic omissions in the taxpayer's books would be symptomatic of the misdemeanor. Whether or not the evasion was committed with a lesser quantum of wilfulness to constitute the misdemeanor or was perpetrated with aggravated wilfulness to constitute the felony would be a jury question.

A related distinction is suggested in **Spies v. United States**, 317 U. S. 492, 499:

> "We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues, Congress intended some wilful commissions in addition to the wilful omissions that make up the list of misdemeanors. **Wilful but passive neglect of the statutory duty may constitute the lesser offense,** but to combine with it a wilful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony."

A misdemeanor under Section 3616 would be committed by "willful but passive neglect of the statutory duty" and would in essence be a form of aggravated neglect. For example, a taxpayer by willful neglect may omit to keep accurate books and records and, as a result of his neglect, he knowingly files a false and fraudulent return with intent to defeat the tax. He would be guilty of violating Section 3616 (a). If, on the other hand, he purposely and deliberately omits items of income from his books and records for the purpose of evading taxes and then files a fraudulent return, he has violated Section 145 (b). The difference again would be dependent on the taxpayer's state of mind and may be slight. But the difference between the degrees of murder and the difference between murder and manslaughter is also mental and may be slight. The aggravating element which distinguishes the felony and the misdemeanor would be thus primarily a mental one. Or the aggravating incident may be the difference between a substantial understatement of income and a small understatement of income. Such a distinction is recognized in the policy of the government in choosing which applicable law to invoke. Whether an understatement is substantial or not would be a jury question.

It may be that the mere filing of a fraudulent return in an attempt to defeat taxes does not constitute a felony

violation in the absence of other affirmative acts of fraud. **Spies v. United States**, 317 U. S. 492, supports this view in its holding that the mere failure to file a return or the mere failure to pay a tax, misdemeanors under Section 145 (a), do not without more authorize a conviction of the felony. But this Court has said in **United States v. Beacon Brass Co.**, 344 U. S. 77, that attempts to evade taxes by filing false returns constitute a violation of Section 145 (b). That case specifically held that an indictment charging a defendant with making oral fraudulent statements to a Treasury agent for the purpose of evading taxes was punishable under Section 145 (b) and not under Section 1001 of the Criminal Code, 18 U. S. C. A., § 1001. Whether or not Section 3616 (a) was applicable to the allegations of that indictment was not considered. This view would require the overruling of **Beacon Brass.** It would also mean that the phrase "in any manner" as used in Section 145 (b) by implication excludes the specific misdemeanors that Congress has proscribed. It should be noted that **Beacon Brass** did not consider Section 3616 (a). Where there are two acts on the same subject matter, effect should be given to both, if possible. **United States v. Borden Co.**, 308 U. S. 188, 198. Effect would be given to both statutes by holding that the mere wilful filing of a fraudulent return with intent to defeat taxes only constituted a misdemeanor under Section 3616 (a). Under this view the instant indictment only charges a violation of the lesser offense.

Even if the lesser offense must be necessarily included in the statutory definition of the crime for which defendant is indicted, petitioner was still entitled to an instruction as to a lesser offense. The phrase "in any manner," as used in Section 145 (b), is not employed in a vacuum but has to be considered in relationship to the entire tax structure and the possible methods of tax evasion. It is

not without limitation.[8] In a tax-collecting system which, despite use of the withholding device, continues to rely "largely upon the taxpayer's own disclosures" (**Spies v. United States**, supra, at 495; see also **United States v. Murdock**, 290 U. S. 389, 395-396), the most obvious "manner" in which evasion or defeat is likely to be attempted is a false statement to the Treasury of the facts upon which the tax is based. This plain fact is highlighted in this Court's **Spies** opinion by the examples given (317 U. S., at 499):

> "Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished 'in any manner.' By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind and **any conduct, the likely effect of which would be to mislead or to conceal.** If the tax-evasion motive plays any part in such conduct the offense may be made out."

Spies illustrates the variety of conduct from which a violation of Section 145 (b) might be inferred. Ultimately, in each of these illustrations, the essence of the wrongful attempt lies in misrepresentations of fact to the taxing officials. Thus, "keeping a double set of books,

[8] In *United States v. Noveck*, 273 U. S. 202, it was held not to be so comprehensive as to impliedly repeal, as to false returns, the general perjury statute.

making false entries or alterations, or false invoices or documents" would not fall under Section 145 (b) were their purpose anything other than "to mislead or to conceal."

Section 3616 (a) forbids not only the delivery of "any false or fraudulent lists, return, account or statement" but also proscribes against the disclosure of such items. Since every reported tax evasion case either contains a false statement or false disclosure to a government representative, the language of Section 3616 is as broad in fact as Section 145 (b).[9]

The fact that convictions were sustained in **United States v. Smith,** 3 Cir., 214 F. 2d 887, and **United States v. Kafes,** 3 Cir., 206 F. 2d 905, where the taxpayer did not file any return does not make Section 145 (b) broader in scope than Section 3616 (a). In the **Spies** case this Court held that the willful attempt to evade of Section 145 (b) could not be established by mere proof of failure to file a return or pay a tax but that some willful commission was necessary. This willful commission is either a false

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[9] Under Section 38 Eighth of the Corporation Excise Tax Act of 1909 (36 Stat. 11, 117) and Section 11 F of the Income Tax Act of 1913 (38 Stat. 114, 171), it was an offense to make "any false or fraudulent return, or statement, with intent to defeat or evade the assessment * * *." Similar provisions appeared in Section 18 of the Revenue Act of 1916 (39 Stat. 756, 775) and Section 1209 of the Revenue Act of 1917 (40 Stat. 300, 336). Section 253 of the Revenue Act of 1918 (40 Stat. 1057, 1085), introducing the language now found in Section 145 (b), declared that anyone "who willfully attempts in any manner to defeat or evade the (income) tax imposed by this title, shall be guilty of a misdemeanor * * *." See also Section 1308 (b) of the same Act, 40 Stat. 1143. This provision was reenacted in the Revenue Act of 1921, Section 253 (42 Stat. 227, 268). In 1924, the provision was enacted as Section 1017 (b) of the Revenue Act of 1924 (43 Stat. 253, 344) as a felony in the language now found in Section 145 (b) of the Code, and was carried forward in subsequent Revenue Acts and into the Code. 44 Stat. 9, 116; 45 Stat. 791, 835; 47 Stat. 169, 217; 48 Stat. 680, 725; 49 Stat. 1648, 1703; 52 Stat. 447, 513; 53 Stat. 1, 63.

statement or disclosure with intent to deceive. This is the essence of this offense and such acts of commission were present in both **Smith** and **Kafes.** The defendant in the **Kafes** case did not keep proper books of account and therefore one can infer that he disclosed a false account to a government representative in violation of Section 3616 (a). And in the **Smith** case defendant made false representations to revenue agents and altered his records which undoubtedly led to a false disclosure. These two cases mean that a taxpayer who fails to file a return is not immune from a tax evasion prosecution if he makes false disclosures to agents with intent to defeat taxes.

Assuming further that Section 3616 is not as broad as Section 145 (b), a lesser instruction still should have been given. Section 3616 and Section 145 (a) should be considered as if they were one statute. Considering these statutes as one, it is clear that there can be no violation of Section 145 (b) without violating these combined misdemeanor provisions. Embraced in every violation of the major offense is a lesser dereliction. Whether a lesser offense instruction is required should not rest on the narrow ground that these two misdemeanor sections are in two different statutes as the same Congressional intent is involved whether they are embodied in the same or different statutes.

II.

An offense under Section 145 (a) of the Internal Revenue Code of 1939, a misdemeanor which forbids the wilful failure to pay a tax, make a return, keep required records or supply required information was "necessarily included in the offense charged" and the trial court should have so instructed the jury.

The trial Court also refused a requested instruction which would have permitted the jury to convict petitioner of a misdemeanor under Section 145 (a) of the Internal

Revenue Code of 1939 if it found that he wilfully failed to pay taxes, make a return, keep records, or supply information required by law. The court held, in regard to § 145 (a), that there was no evidence offered "that defendant failed to file a return or to show the willful failure to pay the tax when due, except insofar as willfulness was involved in the charged willful and felonious attempt to evade the payment of taxes owed" and therefore it was not error to instruct on an offense not presented by the evidence (R. 116-117).

Section 145 (a) makes it an offense to fail to pay a tax,[10] to fail to make a return for the purpose of the computation, assessment or collection of a tax,[11] to fail to keep any records for such tax purposes, or to fail to supply information for such purposes.[12]

It is impossible to violate Section 145 (b) without violating Section 145 (a). If a "necessarily included" offense means that "it is impossible to commit the greater without first having committed the lesser", then this misdemeanor is included in the felony involved. Every wilful attempt to evade income taxes necessarily includes a default in payment, a failure to make a return, a failure to keep proper records, or a failure to supply required information. One or more violations of Section 145 (a) are "necessarily included" in every violation of Section 145 (b) and one or more offenses under the former section are therefore necessarily included in an offense under the latter section. A wilful attempt to evade taxes in any manner will always include one or more of the omissions proscribed by Section 145 (a). One default always present in the greater offense is that a tax be due. A

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[10] *Spies v. United States*, 317 U. S. 492, 496.

[11] *United States v. Sullivan*, 274 U. S. 259, 262.

[12] *United States v. Murdock*, 290 U. S. 389, 391.

failure to keep required records is present in every case. Section 54 of the Internal Revenue Code of 1954. imposes a duty on every taxpayer to "keep such records . . . as the Commissioner, with the approval of the Secretary, may from time to time prescribe." The records required to be kept are prescribed in the Regulations. Treasury Regulation 111, § 29.54-1, provides with certain exceptions that "for the purpose of enabling the Commissioner to determine the correct amount of income subject to the tax," permanent records shall be kept "as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown by any return . . .". Cf. **United States v. Carroll,** 345 U. S. 457, 459-460. The examples of indicia of fraud pointed out in **Spies v. United States,** 317 U. S. 492, all show failures to keep records which truly reflect income. A failure to supply the required information is present in cases where the evidence shows the defendant kept a double set of books, made false entries, used false invoices, destroyed books or records, concealed assets, concealed his income source, or handled his affairs to avoid making the usual records. The misdemeanor and the felony both require a failure to make a disclosure as to the amount of income of the taxpayer. The failure to file returns may constitute a violation of the felony section if other affirmative aggravating acts are shown.

Spies v. United States, 317 U. S. 492, presented the question as to whether a wilful failure to file a return, together with a wilful failure to pay a tax without other evidence constituted an attempt to evade a tax within the meaning of Section 145 (b). Although this Court held that it took more than the sum of two such misdemeanors to make a felony violation under Section 145 (b), it concluded that a felony may include lesser offenses in combination with each other or with other elements and that the felony proscribed by Section 145 (b) included one or several of the other of-

fenses against the revenue laws. This Court also pointed out in the **Spies** case that the felony involved "some wilful commission in addition to the willful omissions that make up the list of misdemeanors". The willful commission would be the aggravating offense lifting the misdemeanor into the felony.

The evidence in this case required such an instruction. The government's theory was that the defendant's records did not reflect all of his income. The evidence, therefore, must support the inference that he failed to keep the records required by Section 145 (a). The government also contended that defendant did not pay all of the tax that he should have paid and thus proved a failure to pay tax. The government's position also supports the inference that defendant failed to supply information and failed to make a complete return of all of his income. If Section 145 (a) in proscribing an offense for failure to make a return also includes a failure to make a complete return, then this too would be embraced by the evidence.

Clearly if both Section 3616 (a) and Section 145 (a) are considered as if they were one statute, every violation of Section 145 (b) offends against the misdemeanor provision. Where there is evidence to show either a felony or one or more misdemeanors the prosecuting officials should not have the sole choice of deciding the offense of which the accused may be found guilty. If there are several offenses possible under the evidence and if there is a lesser offense embraced within a greater offense, defendant should be entitled, when he so requests, to the verdict of the jury on this issue in accordance with Rule 31 of the Federal Rules of Criminal Procedure.

III.

The mere identification of seven checks payable to and endorsed by petitioner did not establish a sufficient foundation to shift the burden of going forward with the evidence to petitioner and this foundation was likewise insufficient to justify their admission into evidence.

Determinative of the issues relative to the sufficiency of the evidence are the seven Packs checks. The only other item of income alleged to be unreported was a $2000 cash fee from Broadhead, in 1950, $1000 of which was reported as income and so listed on petitioner's books (R. 47). This item was received under circumstances indicating the splitting of a fee between petitioner and another lawyer (R. 42). The court held, in regard to the seven Packs checks, that the foundation offered by the Government fully indicated that all the receipts were income and that the transfer of the burden of proof or the burden of going forward with the evidence to the defendant was proper because there was a manifest disparity in convenience of proof and opportunity of knowledge between the defendant and the Government as these checks were payable to defendant under circumstances indicative that they were for legal services, and that this evidence was fairly indicative of income received by defendant. The court stated that this evidence, "coupled with evidence that defendant attempted to conceal a portion of it by not entering it on his books and not reporting a substantial amount in his returns, was sufficient to show the willful filing of a false return" (R. 112-115, 121).

The decision below rests primarily on a presumption that the mere receipt of money from a known source constitutes income even when the payer of the money is present in the courtroom if the government does not desire to call him as a witness. Neither the existing precedents nor the facts of this case warrant such a drastic shifting of the burden of proof in a criminal case.

These seven checks were identified by the Secretary of the Thomas Packs Amusement Company, who did not know the reason for their issuance (R. 31-32). Thomas Packs, who had full knowledge of why the checks were issued, was in the courtroom and had talked to the revenue agent, but was not called to testify (R. 59). The name Packs was clearly marked in petitioner's book. Petitioner also told the agent that he only recorded in his books items of income (R. 58-59).

The record, however, does not show whether petitioner, a lawyer, represented a client who had a claim against Packs, or what relationship existed between him and the Packs Amusement Company. Most amounts received by the average lawyer do not represent income. In view of the nature of the legal profession, the mere receipt of money does not represent income. Before the burden of proof should have been shifted, evidence should have been introduced to show that petitioner received the checks under circumstances indicating some omission of income. The government's theory was that any money received by a lawyer is income unless he can explain or convince the jury that the money is not income. The burden of proof or the burden of going forward with the evidence should not be so shifted to defendant.

It is true that "the prosecution does not have to adduce positive evidence to support a negative averment, the truth of which is fairly indicated by established circumstances and which, if untrue, could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control." **Rossi v. United States**, 289 U. S. 89, 91-92. See also **Morrison v. California**, 291 U. S. 82, 88. But the tests recently reiterated in **United States v. Fleischman**, 339 U. S. 349, 361, emphasize that before the burden of proof may be shifted, the government's case must be independently established to some extent, and there must be a "manifest disparity in

convenience of proof and opportunity for knowledge." The inculpatory evidence must have "at least a sinister significance" and there must be "a serious practical handicap" if the prosecution must prove the negative proposition.

The court below agreed that this evidence had no sinister significance. Packs' name was identified in defendant's records and the receipt of money was, therefore, not from an unidentified source. Nor was there any disparity in convenience or any serious handicap on the prosecution. Packs was alive, present in the courtroom and could have been called by the government to show the circumstances under which the checks were made payable to defendant. In the absence of his testimony there were insufficient circumstances to indicate that the checks represented income above the amounts shown in petitioner's income book.

A component of the conclusion of the court below is that the government's investigation did not substantiate petitioner's statement that the total amounts represented on these checks were not income to him. This coupled with the reference to Packs in his records was a lead whose validity the Government was required to investigate. "When the Government fails to show an investigation into the validity of such leads, the trial court might consider them as true and the Government's case insufficient to go to the jury." **Holland v. United States**, 348 U. S. 121, 135-136.

Such an investigation should have included an interview with Thomas Packs. Unless Packs said that the checks were income, the revenue agent could not conclude that defendant's statement could not be substantiated. If Packs told the agent that the checks were income, he should have been called as a witness by the government. And if, while testifying, he denied that the checks were income he could be cross-examined as a

hostile witness. **Finnegan v. United States,** 8 Cir., 204 F. (2d) 105, 111; **Banks v. United States,** 8 Cir., 204 F. (2d) 666, 671. The failure to call Packs as a witness leaves either the conclusion that Packs never told the revenue agent that the checks were income and, if so, the government's investigation was insufficient and did not warrant the conclusion that the checks were income, or the conclusion that there was no "disparity in convenience of proof or opportunity for knowledge" as Packs could have been called as a witness. Failure to call a material witness, without good cause shown, justifies the inference that the testimony of the witness would have been unfavorable. **Wesson v. United States,** 8 Cir., 172 F. 2d 931, 936; **Ford v. United States,** 5 Cir., 210 F. 2d 313, 317; **Schumacher v. United States,** 8 Cir., 216 F. 2d 780, 787.

This Court should not establish a rule allowing the government in a criminal case to make a prima facie case of the receipt of income by the mere showing of the receipt of a check. Otherwise a harsh rule would be established as the jury is at liberty to disregard any explanation offered on behalf of defendant as to the nature of the funds received.

It is true that two checks were marked "fees" and two checks were marked "legal services". These markings were hearsay and a hearsay objection to the checks was made and overruled (R. 46). No foundation was laid that these markings were made in the regular course of business and that "it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter", as required by the Business Records Statute, 28 U. S. C., § 1732.[13] These markings, there-

[13] 28 U. S. C. A., § 1732 provides:

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event,

fore, should have no probative value. In any event, these markings should not be determinative of the issues. The absence of evidence as to when these markings were placed on the checks would preclude any implied admission that these checks represented "fees" to petitioner and "legal services" rendered by him. Besides, the maker's marked purpose may be incorrect. He may mislabel a payment or he may be seeking tax deductions to which he is not entitled. The markings may apply to an ultimate recipient other than petitioner. It should not be overlooked that the books of petitioner in naming Packs and the date of receipt of the checks only excluded a reference to two checks, one in 1950 (Pl. Ex. 4) and one in 1951 (Pl. Ex. 10). The latter check also had no markings of purpose. The net result is that only one check is not noted in the books.

It was at least error to admit into evidence the three checks totaling $5,242.17 which had no markings (Pl. Exs. 5, 6, 10; R. 33, 35, 39, 46).[14] Two of these checks totaling

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shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business', as used in this section, includes business, profession, occupation, and calling of every kind."

[14] We believe that the admissibility into evidence of all seven checks was a "subsidiary question fairly comprised" within the questions presented in Question 3 of the petition for certiorari which is in substance the same as Question 3 in this brief. The body of the petition commenced the argument on this point as follows: "The court below in holding that the evidence was sufficient and that a sufficient foundation was laid for the admission of the seven Packs checks has gone beyond the permissible limits set forth in Holland v. United States . . ." The court below also considered these issues intertwined (R. 112-115). If this issue is not in the questions presented, it is a plain error which the court may notice at its option.

$4500 were issued on the same day, December 30, 1950 and entered on defendant's books as $1500. The other check in the amount of $742.17 was not entered. There were no circumstances to indicate that the balance of these amounts not on petitioner's books were income to him.

In 1950, there remains the $2000 cash Broadhead fee reported as $1000. The argument that this fee was split with a Mississippi lawyer would probably been accepted if all or part of the Packs check had been rejected by the court. The checks were also used to establish petitioner's intent in 1950. The jury would have in all likelihood found an innocent intent in the absence of these checks.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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August, 1955.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 37

PAUL DILLON, PETITIONER,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUGGESTION OF MOOTNESS

We have been informed that the petitioner died on October 20, 1955. Accordingly, it is suggested that the writ of certiorari be dismissed and the case remanded to the Court of Appeals for such further action as law and justice may require. *American Tobacco Co.* v. *United States,* 328 U. S. 781, 815; *Singer* v. *United States,* 323 U. S. 338, 346; *Johnson* v. *United States,* 319 U. S. 503, 520; *United States* v. *Dunne,* 173 Fed. 254 (C. A. 9); *United States* v. *Pomeroy,* 152 Fed. 279 (S. D. N. Y.).

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

OCTOBER 1955.

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